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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 831

WILLIAM H. TEGTMEYER, ET AL.,
Respondents,

vs.

DAISY C. TEGTMEYER,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, AND BRIEF IN SUPPORT THEREOF.

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SUBJECT INDEX.

	PAGE
Petition	2
Questions Presented	2
Statutes Involved	2
Statement	3
Specifications of Errors to Be Urged	8
Reasons for Granting the Writs	8
Brief in Support of Petition:	
Opinions Below	10
Jurisdiction	10
Questions Presented, Statement, Etc.	11
Argument	11
Conclusion	29
Appendix	31

CITATIONS.

Bellovin v. Sheriff, 246 App. Div. N. Y. 623	16
Caruth v. Caruth, 128 Iowa 121	19
Cohen v. Cohen, 252 App. Div. (N. Y.) 885	17
Constitution of the State of Illinois:	
Bill of Rights	14
Constitution of the United States:	
Eighth Amendment	14
Fourteenth Amendment	14
Cunnius v. Reading School District, 198 U. S. 458	23, 25
Gant v. Oklahoma City, 298 U. S. 98	12
General Electric v. Sire, 88 App. Div. 498	17
Hennig v. Abrahams, 246 App. Div. (N. Y.) 621	17
Hollingsworth v. Barbour, 29 (U. S. 4 Pet. 466, 475	22
In Re Estate Colburn, 186 Iowa 593	19
In Re Estate of Titterington, 130 Iowa 356	19
Iowa Probate Statutes	41

PAGE

CITATIONS (continued).

Kane v. Ross, 87 App. Div. 101 17

Le Gros v. Chain Shirt, 187 App. Div. N. Y. 368 16

Marles v. Ritter, 257 N. Y. 240, 177 N. E. 434 16
Minneapolis R. R. Co. v. Rock, 279 U. S. 410 11
Mutual Ben. L. Ins. Co. v. Tisdale, 91 U. S. 238, 243 22
Myers v. Becker, 95 N. Y. 486 17

Nelson v. Hirsch, 264 N. Y. 316 17
Noble v. Union River Logging, 147 U. S. 165 ..... 9, 14

O'Gara v. Kearney, 77 N. Y. 423 16

Pennoyer v. Neff, 95 U. S. 714, 727 22

S & N Trading v. Amazon, 236 App. Div. 739 17
Scott v. McNeal, 154 U. S. 56 ..... 9, 21
Siegel v. Seidenberg, 237 App. Div. (N. Y.) 129 17

Tegtmeyer v. Tegtmeyer, 259 Ill. App. 661 .....10, 12, 32
Tegtmeyer v. Tegtmeyer, 292 Ill. App. 434 ..... 10, 14
Tegtmeyer v. Tegtmeyer, 306 Ill. App. 169 10
Tegtmeyer v. Tegtmeyer, 348 Ill. 434 .....10, 12, 32
The Mary, 13 U. S. 9 Cranch, 126, 144 22

Wagenheim v. Ocean, 235 App. Div. 642 (N. Y.) 17
Walford v. Harris, 78 Hun. (N. Y.) 346 17
Wasserman v. Lupis, 223 App. Div. (N. Y.) 773 17

Statutes.

Illinois Civil Practice Act, Section 138, Sudb. 14 15
Iowa Probate Statutes 41

Appendix.

Chapter 506, Estate of Absentees, Code of Iowa 41
Code of Iowa, Section 12059 43
Opinion Below 31

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DAISY C. TEGTMEYER,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, STATE OF ILLINOIS.

To the Chief Justice and Associate Justices of the United States Supreme Court:

Daisy C. Tegtmeyer, the petitioner above-named, respectfully prays that writs of ceritorari issue to review the orders of the Appellate Court of Illinois for the First District, confirming the orders of the Circuit Court, Cook County. The judgment of the Appellate Court of Illinois became final on July 8, 1940. Petition for leave to appeal from Appellate Court of Illinois, First District, to the Supreme Court of Illinois was denied on October 17, 1940. Leave to file petition for certiorari was extended to March 15, 1941.

Questions Presented.

The appeal below presented a number of questions and no new or different questions arise on this petition. The following are the questions:

1. Did the Courts of the State of Illinois have jurisdiction of petitioner's person or the subject matter of the controversy.

2. May a State Court imprison a person for the nonpayment of a debt and inflict cruel and inhuman punishment in violation of the 8th and 14th Amendment of the U. S. Constitution, and the Constitution of the State of Illinois.

3. Has the State of Illinois jurisdiction of an estate of a deceased which was being administered in the State of Iowa.

Statutes Involved.

U. S. Constitution, Amendments 8th and 14th.
Code of Iowa Chapter 506, Estate of Absentees.
Bill of Rights of the Constitution of the State of Illinois.
The Code of Civil Practice, Statutes of Illinois.

RESTATEMENT OF THE LAW OF CONFLICT OF LAWS

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"Sec. 43. Exercise of Power by States of United States Without Jurisdiction.

Under the Constitution of the United States, the States cannot create interests if they have no jurisdiction.

Comment:

a. Effect of Fourteenth Amendment to Constitution. If a State attempts to exercise power by creating in-

terests with respect to persons or things which it has no jurisdiction to create, its action is in violation of the Fourteenth Amendment to the Constitution and is void in the State itself. The Supreme Court of the United States may review all cases whether from a lower Federal court or from a State court of last resort which involve a question of the exercise of power on the part of a State when it has no jurisdiction."

STATEMENT.

The petitioner has, since July 27, 1933, been confined in the Cook County Jail pursuant to a Writ of *Ne Exeat* of July 27, 1933 and a contempt order of January 5, 1934 adjudging her in contempt of Court with directions that she stand committed and to remain in the County Jail of Cook County, Illinois, until she pay certain moneys and do other acts pertaining to the payment of a judgment rendered against her.

One Henry Tegtmeyer died intestate in Burlington, Iowa, in 1912. His wife, Louise died intestate in 1907.

Both estates were filed for administration in the District Court of Des Moines County, Iowa. Surviving Henry and Louise Tegtmeyer were six children. Frank, William, Edward, Anna, Minnie, and Lillian.

Son, Edward, was administrator of both estates. In administering both estates in Iowa, no mention was made of son Frank for the reason that he was in the habit of disappearing from time to time. The Iowa Courts were not apprised of Frank's disappearance, existence or interest in his parents' estate. Neither Frank nor his estate

were made party to either parents' estate proceeding in Iowa. Administrator Edward and the other four children wishing to close the father's estate did so by dividing the estate between them and in addition entered into a private agreement between them, making provisions for one-half of the share of Frank as follows:

WITNESSETH:

Whereas Edward Tegtmeyer was the administrator of the estate of his deceased mother, Louise Tegtmeyer, and

Whereas he is now the administrator of the estate of his deceased father, Henry Tegtmeyer, and

Whereas all the above named parties are the heirs of said Louise and Henry Tegtmeyer, deceased, and

Whereas there was an older son, Frank Tegtemeyer, who many years ago disappeared and who is supposed to be dead, and

Whereas the said Edward Tegtmeyer as administrator of his deceased mother's estate, distributed the assets thereof, amongst the parties of this agreement, on their stipulation that in the event that the said Frank Tegtmeyer would ever appear and claim his share of said estate, that they would contribute their proportionate part thereof to settle said claim, and

Whereas the said parties of the second part are now desirous of obtaining a settlement of their interests in their deceased father's estate,

Therefore it is agreed as follows: The said Edward Tegtmeyer, administrator of the estate of Henry Tegtmeyer, is to proceed to make a final settlement of said estate and distribute the net assets thereof, amongst the heirs on the assumption that the said Frank Tegtmeyer is dead and left no heirs, but the said Administrator is to retain $5,000.00 out of the assets of said

estate as a trust fund to be kept on deposit in the name of Edward Tegtmeyer, trustee, for a period of ten years in a reliable bank or trust company, and the interest to be added to and become part of said trust fund.

At the termination of the period of ten years from this date, or sooner, if it can be proven that the said Frank Tegtmeyer is deceased, and left no heirs, then the said trust fund with its accumulations is to be distributed in equal parts to the said parties to this contract unless in the meantime the said Frank Tegtmeyer appears and makes claim for his share of said estates.

Should any of the parties to this contract die in the meantime his or her share of said trust fund shall be paid over to the heirs or estate of said deceased party, and the same disposition shall be made of the balance, should there be any remaining, if the said Frank Tegtmeyer should appear and settlement be made with him.

And it is further agreed and understood that the receipts executed by parties of the second part, are not intended to include or receipt for their interests in this $5,000.00 fund.

It is further agreed that Daisy Tegtmeyer, the wife of Edward Tegtmeyer, is to sign this contract with her husband as a guarantee that the said trust fund of $5,000.00 with the interest accumulations, will be kept and distributed as herein provided.

Edward Tegtmeyer,
Daisy C. Tegtmeyer,
W. H. Tegtmeyer,
Anna L. Corbett,
Minnie C. White,
Lillian Nave."

Son and Administrator Edward died and left him surviving his wife and petitioner herein.

On the theory that petitioner, wife of Edward, was a party to the aforesaid agreement, a suit in equity was filed against her in Illinois as sole heir of Edward, and as trustee. The suit was filed by the other heirs to the agreement, or their representatives, for an accounting of the alleged trust created by the said agreement. The purpose of the suit was to distribute the $5,000 which represented one-half of Frank's share in his father and mother's estates, the other one-half of Frank's share, $5,000, being held by William Tegtmeyer of Iowa as Trustee of the real estate of their mother's estate which he has never accounted for or distributed by the order of any court of any jurisdiction or in accordance with the circumstances of which he became Trustee of all of his mother's real estate which amounted to $30,000. And the fact that he was Trustee and was in possesion of all her real estate, this fact was not made known by him to the Probate Court of Iowa at the time of her death. Neither Frank nor his estate were made a party to this action, and no attempt was made to serve Frank by publication or otherwise. The position of plaintiffs being that Frank and his heirs, if any, were presumably dead, and therefore not entitled to notice of any kind. Issue was joined and the matter was referred to a master. He recommended that a decree be entered against petitioner herein in accordance with the prayer of the bill. The decree was affirmed by the Illinois Appellate Court, 259 Ill. App. 661 and by the Illinois Supreme Court, 348 Ill. 439.

After the affirmance by the Supreme Court of Illinois the cause was referred to a Master in Chancery to take the account. During these proceedings an order was entered June 12, 1933 awarding writ of *ne exeat republica* and an order was entered January 5, 1934, adjudging peti-

tioner in contempt of Court for failure to turn over money and answer certain questions. Bail was fixed in the sum of $30,000 in the *ne exeat* proceedings and she was taken into custody July 27, 1933. She was also held by the Sheriff under a mittimus issued pursuant to the contempt order of January 5, 1934.

Petitioner contended that the *ne exeat* and the contempt orders were void because the Courts in Illinois have never had jurisdiction of the subject matter or the person of petitioner, that the Iowa Courts having administered the estates in question have sole jurisdiction, and further that the order finding her guilty of contempt for her failure to pay over money was void.

On appeal to the Illinois Appellate Court the orders were affirmed and leave to appeal to the Supreme Court of Illinois was denied. The Appellate Court of Illinois rendered an opinion printed in the appendix.

From the entire proceedings it is evident that the petitioner was discriminated against in such a way as to deny to her equal protection of the laws. There has been a clear violation of due process and the equal protection clauses of the 14th Amendment.

The State Court has decided the case in a way not in accord with applicable decisions of this Court. The appeal involves a substantial question as will appear from the applicable cases cited in the brief which is hereby made part of this petition. The Illinois Statutes, the Constitution and Bill of Rights of that State have been construed in a manner repugnant to the Constitution of the United States.

A reading of the opinion of the Appellate Courts of the State of Illinois in their entirety and the quotations given in the brief accompanying this petition demonstrates that a Federal question was presented to the State Court and

that the decisions actually determined federal questions so raised.

Specifications of Error To Be Urged.

1. That the Courts of the State of Illinois did not have jurisdiction of petitioner or the subject matter of the action.

2. That the judgments, decrees and orders are void in that petitioner is being deprived of her life, liberty and property without due process of law and has been cruelly punished as a result thereof.

3. That the judgments, decrees and orders may not be enforced by contempt but can only be enforced by execution against property.

Reasons for Granting the Writs.

The questions involved in this case is one of Constitutional law and involves petitioner's liberty and property.

Petitioner has been incarcerated in the common jail of Cook County, Illinois, under a writ of *Ne Exeat* and contempt order for over six years, that said Cook County jail was not and is not intended to be or become a penal institution for the incarceration of persons for a long period of time but was and is intended to be a place for holding persons charged with crime during the pendency of their cases and for persons sentenced for minor crimes and misdemeanors for a short period of time; that on account of the nature of said Cook County jail your petitioner has been compelled to remain in extremely close confinement therein with no fresh air or exercise, has been forced to associate with undesirable criminals charged with infamous crimes, and has received improper, insufficient, poorly cooked and low grade food and liquids, not containing the necessary vitamins to properly nourish and maintain the human body, and that as a direct result

of said close confinement, lack of fresh air and exercise and insufficient nourishment, your petitioner's health has been irreparably injured to such an extent that she is now suffering from active tuberculosis, myocarditis, anemia, arteriosclerosis and a 50% loss of vision due to glaucoma, which several diseases and infirmities have rendered it impossible for your petitioner to work at any gainful occupation whatsoever. Petitioner was a strong, healthy woman at the time she was ordered to be turned over to the custody of the sheriff and incarcerated in the common jail of Cook County July 23, 1933.

Petitioner therefore charges that her being imprisoned in the said common jail of Cook County because of the nature of and conditions in said institution, for such an extremely long period of time, six years, constituted a violation of her legal and constitutional rights and a violation of the eighth and fourteenth amendments of the United States Constitution and of the Bill of Rights found in the Constitution of the State of Illinois.

The decision of the Illinois Courts are in conflict with *Noble* v. *Union River Logging,* 147 U. S. 165, 173; *Scott* v. *MacNeal,* 154 U. S. 56, and the Constitution of the United States.

This Court should determine whether a State Court may imprison a citizen in a common jail for life for the nonpayment of an alleged debt.

This Court should take jurisdiction because of the violation of the due process clause of the 14th Amendment to the United States Constitution and the 8th amendment thereof.

WHEREFORE, it is respectfully prayed that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Appellate Court of Illinois for the

First District, State of Illinois, commanding that Court to certify and send to this Court for its review and determination a full and complete transcript of the record and all proceedings in the case at bar, and that the judgments and orders of said Appellate Court of Illinois for the First District may be reversed by this Honorable Court and that your petitioner may have such other and further and different relief in the premises as to this Court may seem meet and just.

And your petitioner will ever pray.

DAISY C. TEGTMEYER,
Petitioner.

BRIEF IN SUPPORT OF PETITION.

The Appellate Court of Illinois filed an opinion affirming the order awarding the writ of *ne exeat* and the order holding petitioner to be in contempt of Court. (306 Ill. Appellate Court of Illinois 169.) The opinion is set forth in the appendix. A decree directing petitioner to account was affirmed in *Tegtmeyer* v. *Tegtmeyer,* 259 Ill. App. 661 Abst). That decree was affirmed by the Supreme Court of Illinois, 348 Ill. 434. After the affirmance by the Supreme Court of Illinois the cause was referred to a master in chancery to take the account. Thereafter, petitioner was committed on *ne exeat* and contempt orders. Her petition to be released from custody was denied and her appeal was denied, *Tegtmeyer* v. *Tegtmeyer,* 292 Ill. App. 434.

Jurisdiction.

The judgment of the Appellate Court of Illinois was entered on July 8, 1940. Petition for leave to appeal from

the aforesaid judgment was duly filed for the October Term 1940, in the Supreme Court of Illinois and was denied on October 17, 1940. Extension of the time within which to file petition for certiorari in this Court was extended to and including March 15, 1941, by Mr. Justice Frank Murphy on January 7, 1941 (Record p. .....; Appendix p. 44).

The jurisdiction of this Court is invoked under Section 344, 28 U. S. C. A. and Section 237 (b) of the Judicial Code, 28 U. S. C. A. (342b).

Questions Presented, Statement, etc.

The questions presented, statement of the case and the specifications of error relied upon are set out in the petition. A summary of the facts will be given in the argument for the petition for certiorari.

ARGUMENT.

The Illinois Courts had no jurisdiction over the subject matter of the proceeding; if it had jurisdiction it could not enforce its decree by imprisonment for life in a common jail for failure to pay a debt.

Before presenting our argument petitioner submits (1) "That a judgment of the Appellate Court of Illinois which the Supreme Court of the State may review by certiorari becomes final when the latter Court denies the writ, and if it involves a federal question, is thereupon reviewable here." *Minneapolis R. R. Co.* v. *Rock,* 279 U. S. 410. In the instant case the Supreme Court of Illinois denied peti-

tioner the right to appeal from the Appellate Court of Illinois and the writ for certiorari if granted, should issue to the Appellate Court of Illinois.

2. That jurisdiction of this Court, of an appeal from the final judgment of a State Supreme Court, sufficiently appears where the opinion of that Court on a first appeal of the case, from an interlocutory judgment shows that the requisite federal question was raised by and decided against appellant. *Gant* v. *Oklahoma City*, 298 U. S. 98.

Petitioner proposes to bring up for review the entire record including all previous proceedings leading up to the making of the present decree from which an appeal is sought. The first proceeding was a bill to compel the alleged trustee to account for trust funds. A decree was entered restraining the alleged trustee (petitioner) from disposing of any of her property by the Circuit Court of Cook County of Illinois. The Appellate Court of Illinois affirmed that decree (259 App. Ct. Ill. 661). That decree was then affirmed by the Supreme Court of Illinois, 348 Ill. 434. This decree was not final as it required petitioner to account before a Master. During such hearings the orders from which appeal is sought to be made here were entered.

A petition for certiorari could not have issued to the Supreme Court of Illinois to review (348 Ill. 434) for that decree was interlocutory in nature. Such a writ would have been dismissed for want of jurisdiction. *Gant* v. *Oklahoma*, 284 U. S. 594.

Petitioner is the widow of one Edward Tegtmeyer. Edward was the administrator of his father's and mother's estate in the State of Iowa. The other children entitled to share in both estates were five in number. One son named Frank had disappeared. In administering the father's and mother's estate in the Probate Court in Iowa, no mention

was made of Frank. The estates were administered by consent of the other five children on the theory that there was no child by that name in existence.

The five children decided to distribute the estate of their father and entered into a written agreement. It is set forth in full in the statement of facts.

In brief it recites the fact that petitioner's husband, Edward, was the administrator of the father's and mother's estates that Frank had disappeared and that a distribution of the father's estate be made. It was further provided that Edward, the administrator (husband of petitioner) retain $5,000 as a trust fund for a period of ten years. At the termination of ten years or sooner, if it can be proven that Frank is deceased and left no heirs then the trust funds with its accumulations be distributed in equal parts to the parties to the agreement unless Frank should appear and claim his share.

The petitioner is brought into the picture by virtue of the following provisions in the contract 'it is further agreed that Daisy Tegtmeyer (petitioner herein), the wife of Edward Tegtmeyer, is to sign this contract with her husband *as a guarantee* that the said trust fund of $5,000 with the interest accumulations will be kept and distributed as herein provided':

It seems clear from the terms of the agreement that petitioner's obligation, if any, was to guarantee the distribution of the fund entrusted to her husband.

Petitioner's husband having died, the parties and their heirs to the aforesaid agreement brought an action in equity in the Illinois Courts to impress a trust on petitioner's property on the theory that she became the trustee of the funds entrusted to her husband. She was directed by the Illinois Courts to pay over upwards of $30,000 and for her failure to do so, she has been imprisoned since 1933.

Contentions were made in the Illinois Courts that it did not have jurisdiction of the subject matter. (See opinion Appendix.) Contentions were made that the orders were made in violation of the 8th and 14th amendments of the United States Constitution and to the Bill of Rights contained in the Illinois State Constitution. (See opinion 292 Ill. App. 434.)

It is self-evident that the estates of the parents of the children was not fully and completely administered in the State of Iowa due to the fraudulent acts of the heirs themselves (exclusive of Frank). The $5,000 which was by private agreement set aside for Frank, the missing son, was a fund which should have been administered by the Iowa Courts. The entire proceeding in the Probate Courts in Iowa were irregular and tainted with fraud and deceit in that Frank was not listed as an heir and the proceedings never terminated there as they were opened for the purpose of administering his interest. The estates of the parents were Iowa estates and jurisdiction over Frank could have been had by publication of a citation directed to him in accordance with Iowa Probate practice.

This contention was overruled by the Appellate Court of Illinois on the theory that such a contention was previously overruled, and on the further ground that the *situs* of the trust of this part of Frank's share was in Illinois.

The learned Appellate Court was in error when it states that the question of jurisdiction may not be attacked collaterally or in different proceedings.

In *Noble* v. *Union River Logging R. R. Co.*, 147 U. S. 165 at page 173 this Court stated:

> "It is true that in every proceeding of a judicial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings and without which the

act of the Court is a mere nullity; such for example, as the service of process within the State upon the defendant in a common law action, *D'Arcy* v. *Ketchum*, 11 How. 165, the seizure and possession of the *res* within the bailiwick in a proceeding in *rem*, *Thompson* v. *Whitman*, 18 Wall 457; where the property of an absent defendant is sought to be charged, *Gaysin* v. *Page*, 18 Wall 350; *Guaranty Trust Co.* v. *Green Cave Railroad*, 139 U. S. 137. So if the Court appoint an administrator of the estate of a living person, or, in a case where there is an executor capable of acting, *Griffith* v. *Frazier*, 8 Cranch 9 ..... In these and similar cases the action of the Court or officer fails for want of jurisdiction over the person or subject matter. The proceeding is a nullity and its invalidity may be shown in a collateral proceeding."

Since it was shown that the estates in Iowa were reopened and a person was capable of acting there to administer the unadministered estate to which Frank was entitled to, the Illinois Courts did not have jurisdiction of the person of petitioner or the subject matter.

Further, by the laws of Illinois, Section 138 Subd. 14 of the Civil Practice Act, it is provided that jurisdiction of a person unknown, may be had by publication. In the proceedings against the petitioner in the Illinois Courts, Frank Tegtmeyer, the missing heir, is not made a party to the proceedings, he is neither plaintiff or defendant nor was jurisdiction obtained of Frank as outlined by the Illinois Civil Practice Act. The decree certainly is not binding on him or his heirs for want of service of process. Clearly, if the proceeding is one to enforce a trust, which is claimed to be transitory, the *cestui que* trust must in some way be a party to the proceeding.

It would appear from the record that the Illinois Courts in order to obtain jurisdiction of petitioner have changed her status from one of a guarantor to one of a trustee.

The agreement specifically states that petitioner, "the wife of Edward the Administrator is to sign the agreement with her husband as a guarantee that the $5,000 will be kept and distributed as provided in the agreement. Her obligation is one of indemnity for the default of her husband. She was neither heir, distributee or beneficiary of her husband's parents' estate.

For failure then to guarantee the acts of her husband which is nothing more than a failure to pay a debt of her husband, she is imprisoned until such time as she makes payment of $30,000. This on the theory that in failing to pay as directed by the Court she was guilty of contempt of Court, and imprisoned in the common jail of Cook County and has been held there for over six years and a mandate has been issued from the Appellate Court of Cook County pending this action to return Mrs. Tegtmeyer to the jail irrespective of her serious condition of health as shown by affidavit of William H. Kenner, M.D., which also states that further confinement in the jail or similar institution would result in the very early death of Mrs. Tegtmeyer.

As illustrative of the wide range of situations in which enforcement of judgments of the Supreme Court by contempt has been denied, and the successful party remitted to remedy by execution, the following may be noted; restitution of moneys paid on a judgment, subsequently reversed (*Marles, Inc.* v. *Ritter,* 257 N. Y. 240, 243, 177 N. E. 434; *O'Gara* v. *Kearney,* 77 N. Y. 423, 425, 426; *LeGros* v. *Chain Shirt Shops, Inc,.* 187 App. Div. 368, 370, 176 N. Y. S. 621), moneys found due on a partnership accounting (*People, ex rel. Bellovin* v. *Sheriff of Kings County,* 246 App. Div. 623,

282 N. Y. S. 966, affirmed 270 N. Y. 631, 1 N. E. 2d 364) even though payment had been directed to a receiver (*Walford* v. *Harris*, 78 Hun. 346, 347, 29 N. Y. S. 126) moneys due an attorney (*Kane* v. *Ross*, 87 App. Div. 101, 103, 84 N. Y. S. 111, affirmed 177 N. Y. 557, 69 N. E. 1125), paid on a fraudulent mortgage (*Hennig* v. *Abrahams*, 246 App. Div. 621, 622, 282 N. Y. S. 970, affirmed 270 N. Y. 626, 1 N. E. 2d 362), received under a void assignment for the benefit of creditors (*Myers* v. *Becker*, 95 N. Y. 486, 492, 493) recovered by reason of a misappropriation of corporate funds (*Nelson* v. *Hirsch*, 264 N. Y. 316, 318, 190 N. E. 653) or pursuant to a judgment creditor's action (*Siegel* v. *Seidenberg, Keroes & Dratfield, Inc.*, 237 App. Div. 129, 261 N. Y. S. 350) *or payable to a receiver in sequestration proceedings. General Electric Co.* v. *Sire*, 88 App. Div. 498, 501, 85 N. Y. S. 14). Many additional determinations have reiterated the same principles. See, *e. g.*, *Cohen* v. *Cohen*, 252 App. Div. 885, 886, 300 N. Y. S. 202; *S. & N. Trading Corp.* v. *Amazon Building Corp.*, 236 App. Div. 739, 257 N. Y. S. 1076; *Wagenheim* v. *Ocean Parkway Properties, Inc.*, 235 App. Div. 642, 255 N. Y. S. 184; *Wasserman* v. *Lupis*, 223 App. Div. 773, 227 N. Y. S. 467.

The decisions of the Illinois Courts in brushing aside petitioner's contentions that the order imprisoning her for life in a County Jail were vicious and void and in violation of the 8th and 14th amendments to the United States Constitution and to the Bill of Rights contained in the Illinois State Constitution in that it contains no definite term for the detention and imprisonment of defendant; on the further ground that the contempt order was entered at the request of plaintiffs in an attempt to enforce the terms of the decree for their own exclusive gain and benefit, took the position that her failure to pay over money to a receiver appointed by the Court, was a contempt of Court. Any imprisonment that fol-

lowed was not because she failed to pay the money, but because of her disobedience of the Court mandate in failing to pay.

If there be logic in this reasoning then a person's liberty depends on the disposition of each particular Judge who may or may not punish a person for contempt of Court and thus indirectly imprison such person for his failure to pay a debt.

This amounts to no less than cruel and unusual punishment and a deprivation of a person's life, liberty and property without due process of law in violation of the 8th and 14th amendment of the U. S. Constitution and to the Bill of Rights contained in the Illinois State Constitution which expressly provides that a person may not be imprisoned for a debt.

The personal property of the Estate of Henry Tegtmeyer passed to the Administrator upon his appointment and giving bond. The legal title to this property was in him and the fact that he moved out of the state and took a portion of the property out of the state, did not deprive him of his title to said property. This is the law in Iowa and Illinois and is well settled in the case of *Griffith* v. *Frazier* decided by the Supreme Court of the United States in the 8th Cranch Page 11 and 3rd. Ly. Co-op Ed. Page 471.

Mr. Chief Justice Marshall said:

> "That the appointment of an executor, and his acceptance of the office constitute a complete legal owner of the personal estate of the deceased is admitted. So long as the executor is capable of exercising the authority with which he has been invested by the testator, it can be conferred on no other person. Here the executor, who after taking out letters testamentary,

absents himself from the state. He is still capable of performing and he is still bound to perform, all the duties of an executor. There exists no legal disability in the executor, and, consequently there is no necessity for transferring to another those powers which the testator has conferred on a person selected by himself."

To determine who is entitled to succeed to such property as heirs of the owner, resort is had to the laws of the State to which the owner had his domicile at the time of his death, rather than to the laws of locality in which such personalty happened to be located. *Caruth* v. *Caruth,* 128 Iowa 121. *In re Estate of Titterington,* 130 Iowa 356. See also *in re Estate Colburn,* 186 Iowa 593 and many other cases to like effect.

There is some suggestion that when the Administrator Edward Tegtmeyer removed a portion of the funds to Chicago, that by that act he became an Administrator *de son tort.* This is not the law in Iowa.

This section defines an Administrator *de son tort,* and makes him accountable only to the legally appointed Executor or Administrator.

Edward Tegtmeyer was legally appointed, duly qualified and acting, had given bond for the faithful performance of his duty on which he and the bondsman were liable for any wrongful act.

The complainants in this action claim that Edward Tegtmeyer held the money which was left in his possession only, under the written agreement which they executed, Exhibit 7, and their right of recovery must be against him on this written contract.

The fact that $8,000.00 of the funds of the Estate of Henry Tegtmeyer were drawn from the Bank at Burling-

ton, Iowa in August 1913, the greater part of which was returned before the distribution made on the 18th day of October 1913, in no wise changed the character of the fund. When he made his final report to the Court in October 1913, accounting was made of all of the funds which came into his hands, no concealment was made of any portion of the fund and the heirs receipted in full for their respective shares and later on October 20th executed the contract upon which this action is based, complainants Exhibit #7.

In August 1913 Edward Tegtmeyer invested large sums of his money in a piece of Chicago real estate, the defendant, Daisy Tegtmeyer put in a large sum of her money in the same property. The title was taken in their names as joint tenants with right of survivorship and not as tenants in common. It is shown by the records that Edward Tegtmeyer and Daisy Tegtmeyer transacted their own banking business, kept their accounts in different banks and managed their own affairs. There is no showing whatever, that Daisy Tegtmeyer knew at the time of the purchase of this property or at any time prior to the commencement of this action, subsequent to the death of Edward Tegtmeyer, that any money of the purchase price of the property so purchased, belonged to any other person, than her husband and herself. The title was taken in joint tenancy with full knowledge that upon the death of either, the survivor became invested with the title of the whole of said real estate. If Daisy Tegtmeyer had died first, the entire property would have passed to her husband. This property, so far as the defendant, Daisy Tegtmeyer is concerned was, prior to the commencement of this suit, her sole and individual property, she was in possession as an innocent purchaser for value. It had been sold by her to other parties for valuable consider-

ation prior to the commencement of this action and the impounding of the money she was to receive as the purchase price of this property, or any portion thereof, was in the judgment of the defendants unwarranted and illegal.

The money retained by Edward Tegtmeyer, if any, in the settlement of his father's estate, never passed into the hands of any of the heirs, the agreement so recites, that it be retained by him out of the funds of the Estate of Henry Tegtmeyer and the reason for retaining it was, that there was an absent brother, Frank Tegtmeyer, who had not been heard of for many years, it is so named in the contract, and the money was to be held by Edward Tegtmeyer, deposited in some bank or Trust Company, for a period of ten years or a shorter period, if Frank Tegtmeyer were proven dead.

The existence of the *presumption* that Frank Tegtmeyer was dead was just as valid and forcible at the time said contract was entered into as it is at this time. It was the interest of the deceased brother Frank that was being held and was being held to protect the Administrator in the event that Frank Tegtmeyer should return. No distribution of this fund or any portion of the Estate of Frank Tegtmeyer would have been of any validity whatever as against him, if he should have returned at any time or should he at any time return and claim the same. This matter is well settled by the courts of every jurisdiction. It is sufficient to refer to the opinion of the Supreme Court of the United States, *Scott* v. *MacNeal*, 154 U. S. page 56 L. Co-op Book 38, 896. The case is elaborately briefed and discussed on page 46 of the Opinion, 154 U. S. at 901, 38 L. Co-op the court says:

> "No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party.

The words 'due process' of law,'' when applied to judicial proceedings, as was said by Mr. Justice Field, speaking for this court, 'mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject matter of the suit; and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance.' *Pennoyer* v. *Neff,* 95 U. S. 714, 733 (24; 565, 572). Even a judgment in proceedings strictly in *rem* binds only those who could have made themselves parties to the proceedings, and who had notice, either actually, or by the thing condemned being first seized into the custody of the court. *The Mary,* 13 U. S. 9 Cranch, 126 144 (3:678, 684); *Hollingsworth* v. *Barbour,* 29 (U. S. 4 Pet. 466, 475 (7:922, 926); *Pennoyer* v. *Neff,* 95 U. S. 714, 727 (24; 565, 570). And such a judgment is wholly void, if a fact essential to the jurisdiction of the court did not exist.

The Estate of a person supposed to be dead is not seized or taken into the custody of the court of probate upon the filing of a petition for administration, but only after and under the order granting that petition; and the adjudication of that court is not only upon the question whether he is living or dead, but also upon the question whether and to whom letters of administration shall issue. *Mutual Ben. L. Ins. Co.* v. *Tisdale,* 91 U. S. 238, 243 (23;314,317).

A court of probate must, indeed, inquire into and be satisfied of the fact of the death of the person whose

will is sought to be proved, or whose estate is sought to be administered, because, without that fact, the court has no jurisdiction over his estate; and not because its decisions upon the question whether he is living or dead can in anywise bind or estop him, or deprive him, while alive, of the title or control of his property.

In *Cunnius* v. *Reading School District,* U. S. Sup. Court Rep. in 49 Ly. Ed. on page 1125. In 198 U. S. page 458:

> "The probate court has no power to administer the property of a person who is alive, under its general authority to provide for a settlement of estates of deceased persons, for to do so would violate the 14th Amendment, but the state has power, by legislation, to provide for the administration of the estates of persons who are absent for an unreasonable time, and to enact reasonable regulations on that subject without violating the 14th Amendment. Such legislation must provide for preservation of the estate for a reasonable time, awaiting the possible return of the supposed decedent, and designate such period as one of limitation of time within which to appear, and permit no distribution to heirs until the expiration of the period so fixed."

The presumption of death by reason of absence of a person for more than seven years, is simply one way of proving that the party whose estate is to be administered is dead. The absence itself for any period is not sufficient even to evoke the presumption, unless it was shown that diligent search or an attempt made to locate the absentee, the mere absence of a person for seven years or for any other period, does not entitle any person or persons to take his property and distribute it among themselves. The only way in which it can be done is by notice to the per-

son so absent and to all other persons interested. No legal presumption arising that a man who left his home in apparent good health at early manhood, single, remained single, or that he died, if he is dead, died without heirs or without creditors. His estate, during his absence, must be held to await his return, unless the necessary legal steps are taken to have him adjudged dead and his property distributed according to the law of his domicile.

Frank Tegtmeyer, owed his brothers and sisters nothing. They are not seeking to attach his property and subject it to their own use by reason of any debt or claim that they might have against him in this respect. Attorneys for complainants seem to have been confused. A Trust agreement between his brothers and sisters to take and divide his property among themselves was of no effect or validity. His estate could only be administered in the State of his domicile, after due notice, as required by statute. The contract of October 20, 1913 in no manner bound the Estate of Frank Tegtmeyer, if he were dead, or his interest in the Estate of Henry Tegtmeyer, if he were dead or alive. His estate could only be distributed, after due notice and an opportunity given for the absentee, his widow, heirs, legatees or creditors to appear and show who his legal heirs were and their respective rights in the Estate.

The Estate of an absentee does not pass to his heirs by reason of his absence. His absence can only be used under the statute for the purpose of enabling the parties interested to administer the Estate unless the parties are attempting to enforce a contract or claim against the absentee. It is the absentee's property that is being seized and distributed or unlawfully taken.

In the case of *Nina Wright Beckwith* v. *Daniel W. Bates,* decided by the Supreme Court of Michigan, reported in

200 N. W. Reporter on Page 151. Also A.L.R. Ann. Vol. 37, page 819.

This case collects all of the authorities upon the right to distribute the Estate of an absentee from Paragraph Three of the syllabus:

> Seven years absence of a person without knowledge by his relatives of whether he is living or dead does not vest the right to his property in presumptive heirs or admit of its apportionment among them by way of distribution in ordinary administration as of an estate of a deceased person.

The court also held: "That it is not competent for a state, by a law declaring a judicial determination that a man is dead, made in his absence, and without any notice to or process issued against him, conclusive for the purpose of devesting him of his property and vesting it in an administrator, for the benefit of his creditors and next of kin, either absolutely or in favor of those only who innocently deal with such administrator. The immediate and necessary effect of such a law is to deprive him of his property without any process of law whatever, as against him although it is done by process of law against other people, his next of kin, to whom notice is given."

And such a law violates the 14th Amendment of the Constitution of the United States.

As pointed out in *Cunnius* v. *Reading School Dist.*, 198 U. S. 458, 475, 49 L. ed. 1135, 1132, 25 Sup. Ct. Rep. 721, 3 Ann. Cas. 1121, the probate court has no power to administer the property of a person who is alive, under its general authority to provide for a settlement of estates of deceased persons, for to do so would violate the 14th Amendment; but the state has power by legislation, to provide for the adminis-

> tration of the estates of persons who are absent for an unreasonable time, and to enact reasonable regulations on that subject without violating the 14th Amendment. Such legislation must provide for preservation of the estate for a reasonable period, awaiting the possible return of the presumed decedent, and designate such period as one of limitation of time within which to appear, and permit no distribution to heirs until the expiration of the period so fixed. See also *Blinn* v. *Nelson*, 222 U. S. I. 56 L. ed. 65, 32 Sup. Ct. Rep. 1 Ann. Cas. 1913 B, 555.

The written agreement of October 20, 1913 was an attempt by certain persons, who claimed to be the heirs of Frank Tegtmeyer, to divide his property without notice of any kind, and to distribute a fund in the hands of the District Court of Des Moines County, Iowa, arising from the estate of Henry Tegtmeyer in an unlawful and surreptitious manner concealing their action from the court and was joined in by all of the complainants or their ancestors, who claim an interest in the unlawful fund they sought to be distributed.

The Iowa Statute for the distribution of the Estate of Absentee was drawn with due care to comply with the decisions of the Supreme Court of the United States.

The Agreement made October 20, 1913, Plaintiff's Exhibit No. 7, provides:

> Therefore it is agreed as follows:—The said Edward Tegtmeyer, administrator of the estate of Henry Tegtmeyer is to proceed to make a final settlement of said estate and distribute the net assets thereof amongst the heirs on the *assumption*, that the said Frank Tegtmeyer is dead and left no heirs but the said Administrator is to retain $5000.00 out of the assets of said estate as a trust fund to be kept on

deposit in the name of Edward Tegtmeyer Trustee for a period of ten years in a reliable bank or Trust Company and the interest to be added to and to become part of said trust fund;

At the termination of the period of ten years from this date or sooner, if it can be proven, that the said Frank Tegtmeyer is deceased and left no heirs, then the said trust fund with its accumulations is to be distributed in equal parts to the said parties to this contract unless in the meantime the said Frank Tegtmeyer appears and makes claim for his share of said estate;"

There was to be no distribution at any time unless it was proven that the said Frank Tegtmeyer is deceased and left no heirs. The evidence shows that Frank Tegtmeyer had been absent for a number of years, but there is little if any evidence and none competent, to show any real effort on the part of the complainants to find him or to ascertain whether or not he was dead and there is no evidence whatever in the record to show that he left no heirs.

The domicile of Frank Tegtmeyer must be his home in Iowa, from which he absented himself, otherwise there is no proof of his absence and in accordance with the authorities cited, his estate must be distributed to the heirs entitled to it under the laws of the state of his domicile. There being an expressed provision in the Code of Iowa as to the manner in which this could be done, this must be followed before the title to any of Frank Tegtmeyer's property or his interest in his father's or mother's estate passes to the heirs.

Until it is proven in the manner provided by the statute, that he is dead, who his heirs are, whether he died testate or intestate and whether he left creditors or not, or until

an opportunity is given, after the notice required by the statute, his brothers and sisters have no interest in his estate, which they can divide.

The agreement was not binding or enforcible. All of the parties to the agreement deliberately entered into an unlawful combination to deceive the court and to distribute among themselves the Estate of Frank Tegtmeyer or his interest in his father's estate. Such a contract is unenforcible in law or in equity.

The plaintiffs have no right to maintain this action, they have a plain, speedy and adequate remedy at law to have the absentee's estate administered in accordance with the statute.

Petitioner was not a party to the Agreement. She claims that she never signed the agreement, no person testified to seeing her sign it and her signature is in dispute even the experts do not agree as to whether or not the alleged signature is hers, but if she had signed the agreement which she emphatically denies, she was not a party to the agreement. She is not named as one of the contracting parties, it is added on the bottom of the contract, she says, without her knowledge:

> "It is further agreed, that Daisy Tegtmeyer, the wife of Edward Tegtmeyer is to sign this contract with her husband as a guarantee that the said trust fund of $5,000.00 with the interest accumulations will be kept and distributed as herein provided."

There is nothing in the agreement that she is to do, nothing that she is to receive, no benefit accruing to her in any manner and she could not be held to answer for any default on the part of her husband. However binding the contract might have been upon her husband, Edward

Tegtmeyer, she is in no manner responsible under the terms of the contract.

These are the questions to be determined upon a review of this case and we believe that the questions are important and serious enough to warrant this Court to grant the writs of certiorari respectfully prayed for.

CONCLUSION.

The petition for writ of certiorari should be granted.

Respectfully submitted,

DAISY TEGTMEYER,
Petitioner.

JOSEPH HELLER,
Attorney for Petitioner.

APPENDICES.

OPINION OF THE APPELLATE COURT.
306 Ill. App. 169.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this writ of error, Daisy C. Tegtmeyer seeks to reverse an order entered June 12, 1933, awarding a writ of *ne exeat republica* and an order entered January 5, 1934, adjudging her to be in contempt of court for failure to answer questions and turn over property. Having failed to make bail fixed at $30,000 in the *ne exeat* proceeding, she was taken into custody July 27, 1933. She was also held by the sheriff under a mittimus issued pursuant to the contempt order.

Counsel for plaintiffs contend that a writ of error is abolished as a means of review in civil cases and § 74 of the Civil Practice Act, chap. 110, Ill. Rev. Stats. 1939, and cases construing that act are relied upon. We do not stop to discuss this phase of the case except to say that the Civil Practice Act went into effect January 1, 1934. The suit in this case was filed in 1925 and the writ of *ne exeat* issued in 1933, so that the procedure is not controlled by the Civil Practice Act. See Rule 1 of the Supreme court.

In 1925, plaintiffs filed their bill in equity in the Circuit court of Cook county to compel Mrs. Tegtmeyer to account for a $4000 trust fund and any profits from the investment thereof. After the issue was made up, the cause was referred to a master who took the evidence, made up his report and recommended that a decree be

entered in accordance with the prayer of the bill. Afterward the matter was heard before the chancellor and March 18, 1930, a decree was entered substantially as recommended by the master, from which Mrs. Tegtmeyer prosecuted an appear to this court, where the decree was affirmed by another division of this court, the opinion being by Mr. Justice Gridley, *Tegtmeyer* v. *Tegtmeyer,* 259 Ill. App. 661. (abst.) A further appeal was prosecuted to the Supreme court where the judgment of this court was affirmed April 23, 1932. *Tegtmeyer* v. *Tegtmeyer,* 348 Ill. 434. After the affirmance by the Supreme court, the cause was referred to a master in chancery to take the account and while the matter was being there heard the record discloses that plaintiffs had considerable difficulty in having Mrs. Tegtmeyer appear before the master. June 12, 1933, plaintiffs filed their verified petition praying that Mrs. Tegtmeyer be required to answer the petition, but not under oath, and that she be stayed by The People's writ of *ne exeat republica* from departing out of the jurisdiction of the court; that she be removed as trustee of the claimed trust funds; that a receiver be appointed to take charge, custody and control of all property found to belong to the trust fund, and that she be required to immediately turn over the property to such receiver or successor trustee. August 5, 1933, Mrs. Tegtmeyer filed her answer to the petition.

In the petition, which is 29 pages, it is alleged the decree was entered March 18, 1930, in which it was found that Mrs. Tegtmeyer had in her possession certain property and securities which were charged with a trust in favor of plaintiffs and that she was ordered to account; that the matter was afterward referred to a master to take the account. It then sets up the proceedings had and the findings of the decree, the affirmance by the Appellate and Supreme courts and specified certain property received

by Mrs. Tegtmeyer, and that she was ordered to account. These facts will sufficiently appear from the opinions of the Appellate and Supreme courts and need not be repeated here. We might say, however, that the petition goes into specific details as to the property, real and personal in which the trust fund, together with other funds, was invested and which the court decreed should be accounted for by Mrs. Tegtmeyer; that there were various hearings before the master on the accounting and diligent efforts to secure an attendance by Mrs. Tegtmeyer before the master so that she might be interrogated as to the use made of the trust fund in investments, reinvestments, etc.; that prior to November 1, 1932, Mrs. Tegtmeyer regularly appeared before the master but since that date and subsequent to the sale of certain of the securities by Mrs. Tegtmeyer (for which it was claimed she was required to account), she did not attend before the master and that counsel for Mrs. Tegtmeyer stated their reason for being unable to have her present was that they were unable to communicate with her; that on April 18, the master issued his subpoena for her to appear which was served on her at her residence in Chicago but that she did not obey the subpoena and did not attend the hearing before the master; that at the request of counsel for defendant, the hearing was continued before the master from time to time and in the meantime Mrs. Tegtmeyer sold many of the securities which were the subject matter of the accounting; that upon learning of such sales, plaintiffs filed their petition and obtained an injunction restraining the transfer of some stock standing in the name of Mrs. Tegtmeyer; that she was not administering the trust in the interest of the beneficiaries but was antagonistic to them and stood in defiance of orders and processes of the court in refusing to give information as to the trust fund; that she "has converted into cash stocks, bonds and property belonging to the said trust fund with the design and intent

to conceal herself and said funds and depart from the jurisdiction of this court, and remove said cash and all trust property and all her property from the jurisdiction of this court," and that petitioners would be greatly hindered and delayed in their efforts to realize the amounts due them upon the stating of the account; that she had threatened to depart from the state and the jurisdiction of the court and take her property with her and prevent petitioners from realizing anything on account of the trust property, regardless of the result of the litigation.

Mrs. Tegtmeyer, in her answer, admitted the entry of the decree of March 18, 1930; that pursuant to the decree she filed her report and account; that by the terms of the decree the $4000 was adjudged to belong to complainants, together with $13,000 which belonged to her and was invested in Chicago real estate; that the decree finds this real estate was sold and a net balance realized of more than $46,000 but she avers that the net balance was $37,562.65. The answer further avers that she was required to deposit with the Chicago Title & Trust Company $10,000 so that the title to the real estate would be guaranteed by the Title Company, etc. The answer then sets up in considerable detail what she did about the sale of certain of the property claimed to belong to the trust fund; admits that at different times she sold certain of the stocks but that they were in her own property and what she has received for them is "much less than her proportionate share" of the property mentioned in the decree; "denies that she at any time threatened to leave the State of Illinois or the jurisdiction of this Court or to take from Illinois and jurisdiction of this court any of said property so decreed as belonging to complainants or any part thereof."

Defendant contends (1) that the decree of March 18, 1930, and consequently, the *ne exeat* and contempt orders

ancillary to it, are void, because the Courts in Illinois have never had jurisdiction of the subject matter of this proceeding. Although this was generally treated by the Courts and counsel as a lawsuit involving the preservation and administration of a trust, it appears from the record that in truth and in fact the proceedings constituted an administration by the Illinois Courts of assets admittedly belonging to an administrator appointed and acting under the laws and Courts of Iowa. We contend that the Circuit Court, and also the Appellate Courts acting in proceedings initiated in the Circuit Court, do not have jurisdiction of the subject matter of the proceedings, because under the Illinois Constitution, Circuit Courts have no original jurisdiction in Probate proceedings; and because the Courts in Illinois do not have jurisdiction, in any event, of the subject matter of proceedings for the distribution of property of a foreign administrator, acquired by him as such in a foreign jurisdiction." And the argument in support of this is that the assets of the estates of Louise Tegtmeyer and Henry Tegtmeyer were being administered in the District Court of Des Moines County, at Burlington, Iowa. There is no merit in this contention. That question was litigated and decided adversely to Mrs. Tegtmeyer when an appeal was taken from the decree of March 18, 1930. In the opinion of this court, written by Mr. Justice Gridley, the court said: "Equally without merit, in our opinion, is counsel's further contention that the circuit court was without jurisdiction to enter the decree in question for the reason that the *situs* of the trust fund was in Iowa. The fact that the present proceeding is against the widow [Daisy C. Tegtmeyer] of Edward Tegtmeyer, deceased (on whose estate no administration was had), does not prevent a court of equity from taking jurisdiction, as she may be considered a trustee *de son tort*. (*Lenhard* v. *Specht*, 180 Ill. 208, 216.) Furthermore, as a suit to enforce a trust is transi-

tory and not local, a court of chancery has jurisdiction of such a suit whenever the trustee may be found, regardless of where the property is located. (22 Ency. Pl. & Pr., p. 20; *Johnson* v. *Gibson*, 116 Ill. 294, 302; *Craft* v. *Indiana, etc., R. Co.*, 166 Ill. 580, 593.) And it appears that, after the creation of the trust in 1913, the fund was invested in land in Cook County, Illinois (where both the trustee, Edward, and his wife, Daisy, resided, and continued to reside until his death, and she thereafter), and the title to the land was taken in both as joint tenants. Hence the *situs* of the trust fund and the avails thereof remained in Cook County, Illinois." Moreover when the case was here on another occasion (292 Ill. App. 434) another ground for quashing the writ was urged—the law does not permit reviewing cases by piecemeal.

But counsel for defendant says: "Even though the original decree below [1930] has been affirmed by this Court and by the Supreme Court on appeal, the question of jurisdiction of the subject matter may be raised at this point," and cites the case of *People* v. *May*, 276 Ill. 332; same cases reported in 251 Ill. 54.

In 251 Ill. 54, suit was brought on his official bond against the clerk of the Circuit Court of St. Clair county on the ground that in approving an appeal bond as directed by the court, he accepted as sole surety a nonresident of Illinois. A demurrer to the declaration was sustained, which was affirmed by the Appellate court but reversed by the Supreme court. In that case the question of the jurisdiction was in no way mentioned. After the case was retried in the Circuit court, plaintiff filed an amended declaration; 32 pleas were interposed, general replications were filed to 17 of them and demurrers were sustained to the remainder. There was a verdict and judgment in plaintiff's favor which, on appeal, was affirmed by the Appellate court and by the Supreme court.

[276 Ill. 332.] The Supreme court in its opinion said defendants moved to dismiss the suit "on the ground that this court had no jurisdiction of the subject matter when the record was in this court before, and therefore the judgment reversing the judgment of the Appellate Court was a nullity and the judgment of the Appellate Court in their favor was final. But the court continuing said: "it is never too late to question the jurisdiction of a court over the subject matter of a particular case and consent of the parties will not confer such jurisdiction." The court overruled defendants' motion to dismiss and affirmed the judgment. As stated in the *May* case, the question of jurisdiction was not passed upon by the trial or Appellate courts. If it had been, that question would have been determined and could not again be relitigated. *Stoll* v. *Gottlieb*, 305 U. S. 165.

If the law was as counsel for defendant contends, then there would be no end of litigation. If in the trial court its jurisdiction over the subject matter was questioned and overruled and the same contention was made on appeal to the Appellate and Supreme courts, and denied, obviously that would be a termination of the question and the matter could not be litigated in any other court at any other time or place. This is the holding of our United States Supreme Court in the *Gottlieb* case, and we think no case in any court has ever held to the contrary. The question of jurisdiction was settled in 259 Ill. App. 661.

As to the sufficiency of the petition for the writ of *ne exeat*, counsel for defendant says the petition "shows that it does not contain a single fact upon which to base the conclusion that Daisy C. Tegtmeyer was about to depart from the state," and *Brophy* v. *Sheppard*, 124 Ill. App. 512, is cited to the point that the writ should not have been issued. We might say that since we hold the trial court had jurisdiction both of the person and the

subject matter, and since the contention now made was not urged in the trial court, it is elementary that in the state of the record such point can not be urged for the first time in a court of review. But, as stated in our former opinion, [292 Ill. App. 434] "although it was charged in the petition filed by plaintiffs for the writ of *ne exeat*, that defendant was about to remove from the State and take therefrom the property which the court had theretofore decreed belonged to plaintiffs; and although defendant denied this allegation in her * * * answer, yet so far as we are advised, there was no hearing of the issue raised by the petition and answer. Obviously if the charge in the petition was not sustained by proof, the writ would necessarily be quashed." We have quoted from both the petition and answer and think that a *prima facie* case was made by the allegations of the verified petition and nothing to the contrary was held in the *Brophy* case and the issue raised by the petition and answer is still undetermined in the trial court.

We might suggest, however, that if application were made to the chancellor to reduce the amount of the bond, which was fixed in July, 1933 at $30,000, in view of what has transpired since that time, the amount of the bond might well be very materially reduced. July 8, 1937, this court ordered that the appeal operate as a supersedeas in the *ne exeat* phase of the case, upon Mrs. Tegtmeyer giving bond for $5000, and also that the appeal operate as a supersedeas in the contempt proceeding upon her entering into a bond for $2000.

Such bonds were approved and Mrs. Tegtmeyer released. [See 292 Ill. App. 434.] After the affirmance by us she voluntarily returned to the custody of the sheriff. Afterward in the writ of error proceeding now before us, we ordered that the writ be made a supersedeas as to both phases of the case upon her giving bond of $1000.

Such bond was approved and filed and she was released. There is no complaint so far as we are advised that Mrs. Tegtmeyer has left the jurisdiction of the court or intends to do so.

We might also say that although the original bill sought to recover only the $4000 with interest thereon at 4%, which $4000 was left with the administrator under the terms of the written agreement entered into between all of the parties, including defendant, on October 20, 1913, yet defendant, Mrs. Tegtmeyer, sought to prevent the recovery from her of the $4000 although there was no defense, legal or equitable, of any kind or character. By the terms of the trust agreement, the $4000 should have been returned without question.

As to the contempt order:

Defendant contends that the order finding her guilty of contempt is erroneous and must be reversed because "It is so drawn that this Court cannot tell from inspecting it that the defendant could have performed the acts mentioned therein, or that she was guilty of a contempt in not performing them"—that the order is ambiguous and this court can not, from a reading of it, "determine what acts on her part would amount to compliance therewith." And counsel says that the order of commitment is not punitive but remedial. Continuing counsel says defendant "was directed in open Court to surrender to the receiver the money and property mentioned and described in the order of August 5, 1933, but refused to do so;" that she was ordered and directed to discover and disclose the disposition and location of moneys described in the order and persisted in her refusal to do so; that she was directed to answer fully and correctly without evasion the questions propounded to her before the master and to answer "competent, pertinent, relevant, proper and material questions" which are not set out in the order

and which she had refused to answer; that she was ordered and directed to report and account fully and disclose all investments, etc., concerning the proceeds of the sale of the property which she refused to do and that in each of these defendant's conduct was willful and contumacious.

The order finding defendant guilty of contempt covers more than 112 printed pages of the record. It contains a copy of the decree of 1930, recites what had theretofore taken place in the suit; a certificate of the master in chancery; questions put to Mrs. Tegtmeyer on the hearing before the master, which she refused to answer (which were clearly pertinent), and that she stated she refused to answer them not on the ground that her answer would tend to incriminate her but "that is my private funds, and, as I said, I am the only one that is being made to comply with the laws, and if others can break the laws, then so can I, and I am going to take that stand."

We think it would serve no purpose to detail the questions put to her before the master but we are clearly of opinion that her refusal to answer them was contrary to the law and wholly unwarranted. That if the order was too broad in requiring defendant to answer "competent, pertinent, relevant, proper and material questions," neither the master nor the trial court will have any difficulty in passing on that phase of the matter. But on the whole we think the questions were pertinent and proper. And as said in our former opinion [292 Ill. App. 434-447], "Nor is any argument made by counsel for defendant that defendant is unable to comply with the contempt order, and we think it obvious that if she did so she would be released in the contempt and *ne exeat* phases of the matter. * * * If a showing were made that defendant was now unable to turn over the money to the receiver as ordered and if she would truthfully answer the question a different question would be presented and the ruling

of the Georgia court in the *Nisbet* case would be applicable. But no such showing has been attempted. If defendant has been long confined in jail it is because she has defied the court. As has often been quaintly expressed, defendant carries the key to her prison in her own pocket."

The record is in the same condition now as it was when it was here on the former appeal. The order awarding the writ of *ne exeat* and the order holding defendant to be in contempt of court are affirmed.

ORDERS AFFIRMED.

MATCHETT, P. J., AND MCSURELY, J., CONCUR.

CODE OF IOWA.

For the convenience of the Court, we are setting out at length, Chapter 506 "Estates of Absentees" and Section 12059, Code of Iowa, introduced in evidence and is part of the record:

ADMINISTRATION AUTHORIZED—PETITION. Administration may be had on the estate of an absentee. A petition therefor must be filed in the office of the clerk of the district court and must allege:

1. That the absentee was a resident of this state and has, without known cause, absented himself from his usual place of residence, and concealed his whereabouts from his family, for a period of seven years.

2. That said absentee has property in this state (describing it with reasonable certainty), all or part of which is situated in the county in which the petition is filed.

3. The names of the persons, so far as known to the petitioner, who would be entitled to share in the estate of the absentee if he were dead.

4. Facts showing that the petitioner is a party who would be entitled to administer on the estate of said absentee in case the absentee were known to be dead. (C., '97 S 3307; S., '13, S 3307; 40 Ex. G. A. S. F. 237, S 3; C, '24, S 11901.)

NOTICE. Upon the filing of such petition, the court, or judge thereof in vacation, shall prescribe the notice and the return day therein, which shall be addressed to and served upon said absentee and the said beneficiaries of his estate. (C., '97, S. 3307; 30 Ex. G.A.S.F. 237, S 3-21; C., '24, S 11902.)

SERVICE. Said notice shall in all cases be served:

1. By publication in the county in which the petition is filed, once each week for eight consecutive weeks, in a newspaper designated by the court or judge, and

2. Personally upon all the known or alleged beneficiaries of the estate of said absentee, residing within the state, in the manner and for the length of time, required for the service of original notices. (C., '97, S 3307; S. '13, S 3307; 40 Ex. G.A.S.F. 237, S 3-a2; C., '24 S 11903.)

PROOF OF SERVICE—FILING. Proof of the publication and personal service of said notice shall be filed with the clerk aforesaid on or before the day set for hearing. (C., '97, S. 3307; S., '13, S 3307; 40 Ex. G.A.S.F. 237, S 3-a3; C '24, S 11904.)

HEARING—CONTINUANCE—ORDERS. If, on the day set for hearing, the absentee fails to appear, the court shall appoint some disinterested person to appear for the absentee and all beneficiaries not appearing, and said cause shall thereupon stand continued until the next term of said court, and the court shall have authority to make further continuance upon proper showing. Said person shall investigate the matters and things alleged in the petition. The

court shall hear the proofs and, if satisfied of the truth of the allegations of the petition, shall order the issuance of letters of administration upon the estate of said absentee as though said absentee were known to be dead. (C., '97, S 3307; S., '13 S 3307; 40 Ex. G.A. S.F. 237, S 3-a4; C., '24 S 11905.)

ADMINISTRATION. The person to whom the administration is granted shall proceed to administer and dispose of the estate in the manner that administrators are required to dispose of and administer the estates of decedents. (S., '13 S. 3307-a; 40 Ex. G.A.S.F. 237, S 3-a5; C., '24 S 11907.)

DECREE AS TO HEIRS. Prior to any order of distribution, the court shall hear proof and determine the legal heirs and beneficiaries of such absentee, and their respective interests in such estate. (S., '13 S 3307; 40 Ex. G.A. S.F. 237, S 3-a8; C., '24, S 11909.)

ADDITIONAL NOTICE. Before determining said heirs and beneficiaries the court may prescribe further and additional notices and the service thereof. (40 Ex. G.A.S.F. 237, S 3-a9; C., '24, S 11910.)

THE CODE OF IOWA SECTION 12059 reads as follows:

EXECUTORS IN THEIR OWN WRONG. Any person who, without being regularly appointed as executor or administrator, intermeddles with the property of a deceased person, is responsible only to the regular executor of administrator, when appointed, for the value of all property taken or received by him, and for all damage caused by his acts to the estate of the deceased.

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1940

TEGTMEYER,
Petitioner,
vs.
TEGTMEYER

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION FOR CERTIORARI.

UPON CONSIDERATION of application of Myrtle H. Moore,

IT IS ORDERED that the time within which to file petition for certiorari in the above entitled cause be, and the same hereby is, extended to, and including, March 15th, 1941.

s/ FRANK MURPHY
Associate Justice of the Supreme Court of the United States.

Dated this 7th
day of January, 1941.

(13)

Office - Supreme Court, U. S.
FILED
MAR 21 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 831

WILLIAM H. TEGTMEYER, ET AL.,
Respondents,

vs.

DAISY C. TEGTMEYER,
Petitioner.

Supplemental Appendices.

JOSEPH HELLER,
51 Chambers Street,
New York City, N. Y.,
Attorney for Petitioner.

INDEX.

PAGE

Affidavit of Daisy C. Tegtmeyer as to presence in Court 1

Affidavit of Daisy C. Tegtmeyer as to Accounting and Compliance with Orders, and inability of any further Compliance 5, 6, 7, 8

Affidavit of Daisy C. Tegtmeyer as to Answers to Questions propounded to her as "competent, pertinent, relevant, proper and material questions," and claim from inception of this proceeding that the Illinois Courts had no jurisdiction in the matter whatsoever. Proceeding belonged in the Probate Court at Burlington, Iowa. Alleged debt of deceased husband. Counter-claim showing complainants were indebted to deceased husband in greater sum than amount claimed 5, 6, 7, 8

Testimony of William Tegtmeyer, Complainant, as to alleged prior verbal agreement, and as to Real Estate of the mother, Louise Tegtmeyer, held in trust for the other heirs 9, 10

Affidavit of Minnie Paulus as to Will giving Chicago Real Estate to Edward Tegtmeyer 11, 12

Affidavit of County Attorney George E. Hill, as to Fraud in the Henry Tegtmeyer Estate, and as to an alleged Will in which the homestead and two lots belonging to Henry Tegtmeyer, the father, were allegedly willed to Eddy Tegtmeyer and no one else 13, 14, 15

Affidavit of County Attorney George E. Hill as to Edward Tegtmeyer being advised and acting under the direction of Charles E. Willner, a lawyer, in what work Mr. Edward Tegtmeyer had in connection with the estate affairs of his late father and mother 14, 15

PAGE

Affidavit of County Attorney George E. Hill as to a long standing feeling of ill will between the late Edward Tegtmeyer and his brother, William Tegtmeyer, with reference to the estate affairs of their parents 14

Petition of appointment of Administrator used as evidence in State v. Martha Miller and is still with those papers 15

Letter of C. H. Mohland, Attorney for Complainants, as to fraudulent transaction in regard to estate. Defendant's Exhibit 8 B 106..... 15

Letter of C. H. Mohland, Attorney for Complainants, as to method pursued in handling the estates of both mother and father were unlawful and the Courts deceived and would surely not have allowed this had facts been known. Sister to re-open estates providing she is not paid the share due her under agreement. Defendant's Exhibit 9 B 107.... 16

Proceedings in the Circuit Court of Cook County, December Term, A. D. 1929, before Honorable Hugo M. Friend, one of the Judges of said Court, as to *Situs* and jurisdiction in the State of Iowa—Illinois Courts having no jurisdiction whatsoever 18, 19, 20

Fraud perpetrated upon the Court which revives the liability under the bond, and compels a distribution of this amount..... 21, 22

Would have to proceed to prove and establish it as a legal fact the death of Frank Tegtmeyer properly in Iowa 21

Not in right Court, cannot come into Illinois at all.... 22

Distributive share is still a part of the Estate in Iowa 22

Must show to the Court of Iowa that missing heir is legally dead and has no heirs..... 22

Where there is any fraud or irregularity practiced upon the Court, the Bonding Company, even though it is discharged, is still liable on the Bond; if there

PAGE

is any fraud practiced it revives the estate with the bond and everything 22

The place to prove the death of Frank Tegtmeyer is in the Court where the estate is probated, the original jurisdiction, where it has its *situs*, and where the court has the power to dispose of it..... 22

Provided by Statute in the State of Iowa, that certain steps shall and may be taken in order to declare a person legally dead, not after the matter has been referred to Master 22

Cannot take part of an estate administered in one court, take it out of there and into another State, into a different kind of court, and administer it there 25

Objections to Master's Report 26, 27

Evidence shows that Illinois Courts have no jurisdiction of the rem..... 27

No reference was made to Frank Tegtmeyer in the Probate Court Proceedings in the Estate of Henry Tegtmeyer or in the Final Report. No attempt made to have him adjudicated dead as provided by law. He was an absentee. No notice was given as by law required. His share taken by the other heirs without the knowledge or consent of the Court. Money had never been distributed, it was funds belonging to Estate of Henry Tegtmeyer in the name of the Administrator 28

Objections of Daisy Tegtmeyer to Additional Findings of Master 38, 40

Missing heir was a citizen of the State of Iowa. Illinois Courts are without authority, power, or jurisdiction to administer the estate.

Further Objections and Exceptions taken by Daisy Tegtmeyer to Report of Master..... 43, 44

Laws of Iowa govern this case. Beyond jurisdiction of Illinois Courts to divest missing heir, a citizen of a foreign State, of his vested interest,

PAGE

or to enter any order in any way to effect the property rights in the State of Iowa; all of which is beyond the jurisdiction of the Illinois Courts and is in contravention and in violation of the Fourteenth Amendment to the Constitution of the United States of America 45

Laws of the State of Illinois, Section One (1) of Chapter fifty-nine (59), being an Act to revise the law in relation to frauds and perjuries, defendant cannot be held to answer for the debt, fraud, or miscarriage of any other person 46

District Court of Des Moines County, Burlington, Iowa, sitting as a Probate Court administering Estates, has at no time adjudicated Frank Tegtmeyer dead nor presumed to be dead and, under the laws of the State of Iowa, he is presumed to be living 45, 46

Motion of Daisy Tegtmeyer to sustain her Objections and Exceptions and disapprove of Master's Report and Dismiss the above Cause of Action.... 48

Complainants wilfully, falsely, unlawfully, and fraudulently misled, misguided Probate Court of Iowa in connection with said Estates 52

Further Answer and Plea of Daisy Tegtmeyer to Complainants' Amended and Supplemental Bill of Complaint as amended 55, 56

Frank Tegtmeyer was a resident of Iowa; he was never a resident of the State of Illinois. Beyond the jurisdiction and power of Illinois Courts to find or adjudicate he was dead or presumed to be dead before the death of his mother or father; beyond the jurisdiction to enter any Order that will effect the property rights, or his heirs or assigns in the State of Iowa; all of which is in contravention of the Constitution of the United States and Section one (1) of Article Fourteen (XIV) thereof 56

Laws of the State of Illinois, Section One (1) of Chapter fifty-nine (59); this defendant cannot be

PAGE

held to answer for the debt, fraud and perjuries, or miscarriage of any other person 57

Petition of Daisy Tegtmeyer 58

Courts of Illinois have no jurisdiction to adjudicate nor find that Frank Tegtmeyer, an absentee, whose last known domicile was in the State of Iowa, was legally dead and disinherit him; any such action in contravention of the Constitution of the United States and more particularly Article Fourteen (XIV) thereof.

Further Objections and Exceptions taken by Daisy Tegtmeyer, Defendant, to the Report of Edwin A. Munger, Master in Chancery to whom the above entitled cause was referred..... 60, 61

The properties belonging to said Estates are, and always have been situated in the State of Iowa, all of which is beyond the jurisdiction of said Master and the Illinois Courts and is in contravention of the Constitution of the United States and more particularly Section One (1) of Article Fourteen (XIV) thereof and without due process of law.

Affidavit of William Howard Kenner, M.D., as to condition of Petitioner's health 63

STATUTES.

Code of Iowa, Section 37, Section 4250, in evidence.. 18, 19

Constitution of the United States, Fourteenth Amendment 45, 56, 59, 61

Section 37, Code of Iowa, in evidence, Section 4250.... 18, 19

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 831

WILLIAM H. TEGTMEYER, ET AL.,
Respondents,

vs.

DAISY C. TEGTMEYER,
Petitioner.

Supplemental Appendices.

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

DAISY C. TEGTMEYER, being first duly sworn, on her oath deposes and says that she is one of the defendants in the above entitled cause; that she was present in court at all times during all hearings had in said cause before the Circuit Court of Cook County, Illinois, at the December Term, A. D. 1929, and that the transcripts of evidence and proceedings, attached hereto, are true and complete records of the proceedings and hearings before said Court at said term.

DAISY C. TEGTMEYER

Subscribed and sworn to before me this 14th day of March, A. D. 1941.

FRANCES SCHULMANN,
Notary Public.

(NOTARIAL SEAL)

AFFIDAVIT OF DAISY C. TEGTMEYER AS TO ACCOUNTING.

STATE OF ILLINOIS } SS:
COUNTY OF COOK }

IN THE

CIRCUIT COURT OF COOK COUNTY, ILLINOIS

WILLIAM H. TEGTMEYER, ET AL
vs.
DAISY C. TEGTMEYER, ET AL

No. B-118301
Chicago, Il.
May 8, 1937

TO WHOM IT MAY CONCERN:

I, DAISY C. TEGTMYER, represented by Attorney Charles S. Harvey, about December 15, 1936, filed a petition for a writ of habeas corpus in the Circuit Court of Cook County, Illinois, of Judge Harry Fisher, and a date was set for the writ of habeas corpus to be heard by him on December 23, 1936.

On December 23, 1936, accompanied by Mr. Harvey, I appeared before Judge Fisher at 10:30 a. m., also appeared opposing Attorney George Wire and John Harrington. Mr. Wire objected to Judge Fisher hearing the writ of habeas corpus and asked that it be transferred to Judge Cornelius Harrington. I objected to going before Judge Harrington on account of a previous hearing brought before him by Mr. Wire and Mr. Harrington in November, 1936 on a petition to take my 75 shares of Commonwealth Edison Stock standing in my name and held by the Chicago Title & Trust Company in escrow agreement until this Iowa Case was disposed of, also the petition asked to take my $850.00 cash I had paid on the purchase of stock of the Edison Company and to take the dividends from me and turn

into the hands of a receiver. I was notified by Mr. Wire by mail the day prior to the hearing. Judge Harrington did not issue an order for the Sheriff to bring me from the jail to the hearing. I sent a telegram to an attorney asking him to go to the hearing and ask for a change of venue to some other Judge, and if that was not granted to ask for a continuance. Judge Harrington would not grant me a change of venue, nor a continuance. The hearing went on without me being present, and Judge Harrington signed an order to take all my securities and my cash and dividends and take them out of my name and transfer them into the name of the receiver; he appointed the National Builders Bank.

As I am a widow all alone in the world and have no one to support me and have been locked up in the jail now almost four years and deprived of earning anything all this time, in addition to being deprived of my liberty, and then to have my $25.00 per month dividend taken from me left me entirely destitute with no funds whatever since last November, 1936.

Therefore as stated above I did not want the writ of habeas corpus for my release to be transferred from Judge Fisher to Judge Harrington. Mr. Wire insisted that Judge Fisher transfer the hearing on the writ of habeas corpus to Judge Harrington. Judge Fisher transferred it to Judge Harrington. I told my attorney, Mr. Harvey, that I thought it best to withdraw the petition for writ of habeas corpus for my release rather than to go before Judge Harrington, as he was prejudiced and would not release me and that it was just a waste of our time going before him, and I explained to him what Judge Harrington had done to me concerning my cash and securities without sending an order for me to be present and had denied me a change of venue or a continuance. Mr. Harvey was not familiar with what had been going on in the case for the

past twelve years, and it was hard for him to understand how I had been taken advantage of, especially the almost four years I have been held a prisoner in the jail. Mr. Harvey said that I had been held in the jail so long and that so many prisoners were being released from the penitentiaries for Christmas only after serving a short time on serious charges, and that I would surely be released. As it was only one more day until Christmas and we did not have time to arrange to go before another judge, and I was ill and wanted so much to be out as I felt I could not endure another Christmas locked up in the jail, at Mr. Harvey's suggestion we went before Judge Harrington on the 23rd, 24th, 26th and 29th of December, 1936. At the conclusion of the hearings on above dates, Judge Harrington announced that he would withhold his decision on my release from the jail until January 26, 1937. I was not present on January 26, 1937, and I was not released. I was advised by attorney that Judge Harrington on January 26, 1937, had stated that he would continue indefinitely his decision. Judge Harrington gave his decision on April 29, 1937, exactly four months after he had heard the petition for my release, and after this four months' delay, and holding me in the jail all that time, even then he did not release me, and he is still holding all my funds in the hands of a receiver. I have no money to buy fruit or food from the jail commissary or to pay my current expenses.

At the hearings before Judge Harrington on the 23rd, 24th, 26th and 29th of December, 1936, most of the time on the case was spent in Judge Harrington's private chambers by Judge Harrington and the attorneys, no one else, not even myself, was permitted to be present at the discussions that took place in his private chambers, so I do not know what took place in there. I asked Mr. Harvey why so much time was being spent on the case in Judge Harrington's private chambers, that I suggested that the entire discussions on the case all be heard in open court or all be heard

in his private chambers, not part out in the open court and part in his private chambers, that the spectators in the court room were displeased with such procedure. Mr. Harvey said that in the Judge's private chambers the discussions mostly consisted on points of law and that these courts had never had a case like this and that they did not know what to be governed by.

Out in the open court room I was called on by Judge Harrington to give testimony. He stated that Mr. Wire, opposing attorney, wished to question me. Mr. Wire started his questions as to what I had done with the proceeds of the sale and dividends of some of my Commonwealth Edison Stock. I answered that some of the transactions had taken place more than ten years ago and I could not definitely, with no records at hand to refresh my memory, as to the exact transactions and proceeds, I could not recall those specific transactions.

Mr. Wire addressed the Court that I was not answering his questions. I told the Court that the answers to Mr. Wire's questions were immaterial any way as they had nothing to do with this case. Judge Harrington said that he was familiar with the case. I told him that this case had been going on in the courts for the past twelve years, and that it was an Iowa Case and they had no jurisdiction here.

My late husband, Edward Tegtmeyer was administrator of his parents' estates at Burlington, Iowa. There were six heirs, one, Frank Tegtmeyer, was absent and his whereabouts unknown. When my husband distributed the assets of his Father's estate to the heirs he held out of the assets Frank's share of the estate, $5,000.00. My husband died on the street here of a heart attack, November 1, 1924. Frank had not appeared and my husband died holding Frank's $5,000.00. Four months after my husband's death Mr. George Wire, who had made arrange-

ments with some Iowa attorneys to take the case on a 50% contingent fee, filed suit here March 11, 1925, to try to collect from me $4,000.00 of the $5,000. my husband held for Frank, claiming $4,000. of Frank's money belonged to them and as I was the administrator's widow they were going to try to collect the $4,000. from me.

Shortly after this suit was filed I deposited $10,000. with the Chicago Title & Trust Company to be held by them until this IOWA Case was disposed of. Later, the $10,000. was invested in 75 shares of Commonwealth Edison Stock.

William Tegtmeyer of Burlington, Iowa who brought this IOWA Case to Illinois is now dead. He held part of the parents estates in a Real Estate Trust to be divided among the heirs. He owed my husband $5,000. as his share of the Real Estate Trust. I filed suit at Burlington, Iowa in March, 1933, to try to collect from him my husband's full share of the Real Estate. The suit is still pending in Iowa, as I was arrested and placed in jail shortly after I filed the suit in Iowa.

I have been in jail now almost four years on a charge of Contempt of Court and $30,000. is demanded for my release.

The questioning went on by Mr. Wire as to my stocks and dividends over a period of the past twelve years, ever since they had filed this suit to try to collect $4,000. Mr. Wire would often address the Court that my answers were not satisfactory. I advised the Court that I had lost greatly on my stocks in the so-called Insull Crash and that I had lost greatly during the depression in many ways. Then Mr. Wire said I had received $30,000. out of the sale of my stocks. I told the Court that had nothing to do with the case, and in the crash I had lost greatly, but it was my own money I had lost, it was the life savings

of my deceased husband and myself, it was our hard earned savings over a period of our married life of more than twenty-five years.

Then I explained to the Court that my husband and I owned in joint tenancy a parcel of vacant real estate of which we had owned for twelve years prior to his death, and that the expenses on the vacant real estate over that period of years had been high. We paid $18,000. for the 80 ft. vacant property without any improvements. We had to pay for street and alley pavements, and for widening the street and for sidewalks and sewers, and for special assessments for widening an adjacent boulevard and special assessments for park improvements. All together with the taxes for twelve years made a total of over $10,000, we had to put into the vacant property. I sold the property in April, 1925 and received $48,000. gross for the property. I paid a 5% commission to the broker who sold the property for me, this amounted to:

		$ 2400.00
I paid $162.00 on title for purchaser		162.00
1 paid $48.00 Government Tax		48.00
I paid $1,000.00 for 1924 taxes for purchaser		1000.00
$10,000, or over, in taxes and improvements		10,000.00
		$13,600.00
$48,000. minus $13,600 leaves	$35,400.00	Net
Deposited with Chicago Title & Trust Company	10,000.00	
Balance	$25,400.00	

I told Judge Harrington that I had made this accounting and other accountings to the Court before I was placed in jail and that I never could satisfy them; that it seemed

they wanted everything my husband and I possessed to satisfy their claim for $4,000.

In addition they have injured my health and reputation and taken almost four years of my life locked up in the jail. I told Judge Harrington that I had lost all that I possessed, but that it had nothing to do with this $4,000 claim that was against my husband, as I had nothing whatever to do with the money my husband held out of the Iowa estate for his brother Frank. As I explained before, the Iowa estate of the parents is a debt of my deceased husband.

Mr. Wire started his questioning again about me selling stocks and receiving $30,000. I told him again that had nothing to do with his $4,000 case, and that I had no $30,000, that I had invested and lost part of it before I was taken to jail, and that my apartment had been robbed twice since I had been locked in the jail and that it had been stolen from my apartment, also my diamond engagement ring and my deceased husband's ring set with small diamonds, pearl earrings, and a ring set with pearls that formerly belonged to my deceased sister, and a gold bracelet set with turquoise stones.

Then I was asked where I got the money to pay the rent on the apartment since I had been in the jail. I told them the rent was $30 per month and that I had paid it from the dividends of my 75 shares of Commonwealth Edison Stock, and with money I had borrowed from friends.

(Signed) Mrs. Daisy C. Tegtmeyer

Subscribed and sworn to before
me this 11th day of May, 1937.

William J. Lenz,
Notary Public, Cook County,
Illinois

TESTIMONY WILLIAM TEGTMEYER, COMPLAINANT AS TO ALLEGED PRIOR VERBAL AGREEMENT, AND AS TO REAL ESTATE OF THE MOTHER, LOUISE TEGTMEYER, HELD IN TRUST FOR THE OTHER HEIRS.

STATE OF ILLINOIS } ss.
COUNTY OF COOK }

IN THE

CIRCUIT COURT OF COOK COUNTY

WILLIAM TEGTMEYER, ET AL.
vs.
DAISY TEGTMEYER, ET AL.
} In Chancery No. B-118301

On pages 109 and 117 the testimony of WILLIAM TEGTMEYER, Complainant, is as follows:

On page 117 is the following question by Mr. Wire:

Q. Now, you have testified on your cross examination that before this contract was reduced to writing you and your brother Edward talked over about making such an arrangement. How long before that, when it was reduced to writing, did you so talk it over?

A. Oh, we talked it over some time before.

Q. Had you talked it over on or about August 14th or 15th or 16th?

(After discussions:)

Mr. Wire: I will withdraw that question.

(It does not support the thought that a verbal agreement was made.)

The transcript shows that complainant, William Tegtmeyer, held three or four parcels of real estate belonging to his mother at and after the time of her death. Defendant, Daisy Tegtmeyer, told William Tegtmeyer about

this real estate and it should be accounted for—that it had not been accounted for. William Tegtmeyer finally admitted that he held title to such real estate. On page 94 of transcript he testified as follows:

Q. Was there anything else belonging to her estate?

A. Not that I know of, but I know it was more money than that. I know that.

Q. Was there or was there not any real estate belonging to your mother's estate?

A. Not directly.

Q. Well, tell us about it indirectly.

A. There was a piece of property here in Chicago and there was a piece of property in Burlington that was in my name; had been in my name for a number of years, for at least 20 years, and there was a voluntary agreement between my mother and I that in the event that she would die that she would trust that I would make a distribution of this property equally among the children.

Q. How many pieces of property were there in Burlington that you held that way?

A. There was two pieces when the settlement was made. There was one in Burlington and one in Chicago.

Q. At any other time how many did you have?

A. Three.

Q. Where was the third one?

A. Burlington.

Mr. Wire: I object to that as immaterial.

The Master: He may answer.

There is evidence that Louise Tegtmeyer had made a Last Will and Testament and left the same with Will Tegtmeyer.

The following affidavit of Minnie Paulus was offered in evidence.

The following affidavit of George E. Hill was offered in evidence.

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

IN THE

CIRCUIT COURT OF COOK COUNTY

WILLIAM TEGTMEYER, ET AL.
vs.
DAISY TEGTMEYER, ET AL.
} In Chancery No. B-118301

AFFIDAVIT.

STATE OF IOWA }
DES MOINES COUNTY } ss.

I, Minnie Paulus, on oath state that I am a resident of Burlington, Des Moines County, Iowa and have been for more than twenty years last past.

That I was well acquainted with Louisa Tegtmeyer during her lifetime and was on very friendly relations with her.

In the latter part of February or the first part of March, 1907, I saw her at St. Francis Hospital in the City of Burlington where she was then making her home. This was just shortly before her death, which occurred, as I remember, sometime in March 1907. While I was visiting her there in her room, she showed me her Last Will and Testament and said that she was going to leave it with her son, Will Tegtmeyer. I asked her what she was doing with it and if she was going to leave it at the Court House and she said she thought Will would take good care of it and would do the right thing by all of them.

She further told me that in this Will she had given the Chicago property to her son, Edward, because he lived in Chicago and could take care of it better than any of the others and that she had helped her son Will by setting him up in business and she told me that at the time Will was married she had given him $2,000.00. She stayed at my house the time of the wedding, she not living in Burlington at that time. She told me that the Will had been drawn by Captain Willner, an attorney in Burlington and was properly signed and executed.

Minnie Paulus

Subscribed and sworn to before me by Minnie Paulus this 13th day of September, 1926.

LaMonte Cowles,
(Notarial Seal) *Notary Public.*

AFFIDAVIT OF GEORGE E. HILL

THE STATE OF IOWA }
DES MOINES COUNTY } ss.

I, George E. Hill, being first duly sworn on my oath do state:

I am fifty-six years of age and reside in the City of Burlington, Iowa, where I have been actively engaged in the practice of law since 1906. I was County Attorney for the Des Moines County, Iowa, from January 1st, 1913, to January 1st, 1919.

I recall that in the September Term of the District Court of Des Moines County, Iowa, 1913, a civil suit was pending between the heirs of Henry and Louise Tegtmeyer, as plaintiffs, and one Martha Miller, as defendant. The said Martha Miller had been acting as a housekeeper for Henry Tegtmeyer and after the death of Henry Tegtmeyer, Mar-

tha Miller presented in Court, for collection, a check purported to be signed by the said Henry Tegtmeyer, dated Burlington, Iowa, September 1st, 1910, drawn on the German American Savings Bank and payable to Mrs. Martha Miller, or bearer, in the sum of Eleven Thousand Four Hundred and Sixty-three ($11,463.00) Dollars.

In the trial of this case, it was positively proven that the check was a forgery and I was called upon as County Attorney to prosecute Martha Miller for uttering a forged instrument. The said Martha Miller was indicted in the October Term, 1913, of the District Court of Des Moines, Iowa, for uttering a forged instrument. A trial was had before a jury and the said Martha Miller was found guilty of uttering a forged instrument and committed to the State Reformatory at Anamosa, Iowa.

There was also a civil action pending in the District Court of Des Moines County, Iowa, between the heirs of the late Henry Tegtmeyer and Louise Tegtmeyer, his wife, and the said Martha Miller, and on which trial the said Martha Miller presented to Court an instrument in words and figures as follows:

> "Burlington, Iowa, Sept. 1st, 1911, for rent I promised Mrs. Martha Miller that she can remain in my house after my death till after her mother's death, everything is Martha Miller's on the place till after her mother's death, then the house and 2 lots go to Eddy Tegtmeyer and no one else, signed by his own had write.
>
> Henry Tegtmeyer
> Mrs. Lucy Wellever
> Myran Wellever
> Welbert Collins"

In the trial of this cause, one E. M. Wellever testified that he saw Henry Tegtmeyer sign the foregoing instrument, which was presented in evidence, and later it developed that this instrument was forgery, and I, as County Attorney, was called upon to prosecute the said E. M. Wellever for perjury. The said E. M. Wellever, as I recall, entered a plea of guilty and he was committed to the State Penitentiary at Fort Madison, Iowa, in the October Term, 1913, from the District Court of Des Moines, Iowa.

I am personally acquainted with Mrs. Daisy Tegtmeyer, the widow of Edward Tegtmeyer, and who now, I am informed, is in the County County Jail of Cook County, Illinois, on a charge of Contempt of Court. I was also personally acquainted with her late husband, Edward Tegtmeyer, and I was also well and personally acquainted with William Tegtmeyer, a brother of the said Edward Tegtmeyer.

I also know that one Charles E. Willner, who was a lawyer, here at Burlington, Iowa, and who has been dead for a number of years, acted as attorney for the heirs of Henry and Louise Tegtmeyer, and I also know that he acted as attorney for and advised the late Edward Tegtmeyer in what work Mr. Edward Tegtmeyer had in connection with the estate affairs of his late father and mother.

I also know that there was a long standing feeling of ill will between the late Edward Tegtmeyer and his brother, William Tegtmeyer, with reference to the estate affairs of their parents.

To all of the above I made my oath at Burlington, Iowa this 31st day of March, A. D. 1936.

(Signed) George E. Hill
Affiant.

Petition for appointment of Administrator—used as evidence in *State* v. *Martha Miller* and is still with those papers.

11/7/13

C. E. D.

Per C. I.

The following letters of C. H. Mohland, Attorney for the original complainants were offered in evidence:

DEFENDANT'S EXHIBIT 8, AND DEFENDANT'S EXHIBIT 9.

Gen. No. B-118301 Edwin A. Munger, Master in Chancery Circuit Court of Cook County, June 27, 1928.
B 106 B 107

DEFENDANT'S EXHIBIT 8.

OFFICE OF
MOHLAND & KUHLEMEIER
Attorneys at Law
Iowa State Bank Building

Burlington, Iowa, August 13, 1924

Mr. Ed. Tegtmeyer,
6431 Ingleside Ave.,
Chicago, Ills.

Dear Sir:

We wrote you on August 7th concerning a certain sum of money due your sister. To that letter we have no answer and we know you received it as it was not returned to us.

We also now have before us a paper sworn to by you wherein you said that all the heirs had been paid their

share of the estate, and on the strength of your oath to that paper you were discharged by the Court, which act on your part was a fraudulent transaction.

We now demand an immediate answer to this letter and will advise you that in case we do not hear from you by return mail something is going to happen.

You will govern yourself accordingly.

Yours truly,

C. H. MOHLAND.

B 106

DEFENDANT'S EXHIBIT 9.

OFFICE OF
MOHLAND & KUHLEMEIER
Attorneys at Law
Iowa State Bank Building

Burlington, Iowa, August 7, 1924.

Mr. Ed. Tegtmeyer,
6431 Ingleside Ave.,
Chicago, Ills.

Dear Sir:

Your sister, residing in Omaha, has employed us to collect from you or your bondsmen the share due her from her parents' estates and which has not been distributed by you.

She has sent us her copy of the Agreement entered into by you in October, 1913 by the terms of which you agreed to distribute between the heirs ten years after date $5000, and the accumulated interest, and that this money should have been kept deposited in a bank. This distribution should have been made a year ago and she now says that she can not hear from you and that you have not divided the money, or in any event she has not been paid her share.

This matter must now be settled without further delay and we will ask you to at once render us a statement of the accumulations so that we may look over it and satisfy ourselves as to its correctness. We might add that the method you pursued in handling the estates of both your mother and father were unlawful and the Courts were deceived by you and would surely not have allowed you to put this through had the facts been known. However, your sister does not wish us to re-open the estates providing she is paid the share due her under this agreement, without further delay.

Let us hear from you by return mail.

Yours truly,

MOHLAND & KUHLEMEIER
By C. H. MOHLAND

B 107

IN THE

CIRCUIT COURT OF COOK COUNTY

DECEMBER TERM, A. D. 1929

General No. B-118301

Before HONORABLE HUGO M. FRIEND,
One of the Judges of Said Court:

Petitioner herewith presents the rulings of the Court:

The Court: All right. You may proceed, Senator, whenever you are ready.

Senator Cowles: They took receipts from the five heirs and on a showing that we have here, that report, they made the statement that all of the heirs, all persons interested in the estate signed a receipt, never at any time disclosing to the Court in Iowa anything about this absent brother. And they got the estate distributed among the five heirs of Louise Tegtmeyer, 1907, and Henry Tegtmeyer of 1913. Well, now, they couldn't dispose of Frank Tegtmeyer's interest in the estate in that manner. We introduce, or I call your Honor's attention to Section 37 of the Code of Iowa that was introduced in evidence in the case.

> "This agreement made this 20th day of October 1913, by and between Edward Tegtmeyer of Chicago, Illinois, party of the first part, and William Tegtmeyer, Anna Corbett, Minnie White, Lillian Nave, parties of the second part."

Mrs. Tegtmeyer is not mentioned as a party to this agreement at all.

Senator Cowles: The fact that they had signed this agreement, they did it without the knowledge of the Court.

The Court: I suppose, that under your law, any estate can be re-opened.

The Court: Well, now, is it your contention, Senator, that they would be required to go into the Probate Court in Iowa to get a ruling on the administrator out there or to file some supplemental proceedings and distribute the money under that law?

The Court: Rather than to come into this proceeding here.

The Court: The Senator is now arguing that the trustee of that trust fund that you are contending for is dead. That you can't charge his wife with any accounting under such fund, unless she agreed in writing to carry it out. That is the point he is making now.

The Court: Could they do that after the administrator had died and after he had been discharged and his bond cancelled?

Senator Cowles: Well, no. In a case of that kind his bond would not be cancelled.

The Court: After his death?

The Court: You better keep these exhibits together before they get away from you.

The Court: Your principal contention is the question, jurisdictional question.

Senator Cowles: Section 4250 Code of Iowa is that you can't make evidence by coming in and saying that you had a conversation with somebody who is dead and he is not here to answer. That is not evidence in Iowa. It is not evidence in Illinois or any other place I know of. That is the only evidence that was offered in this case of any prior agreement.

Senator Cowles: There is no evidence at all of any prior agreement by any person as to this distribution. This statement that appears in the bill that it was with

reference to a prior oral agreement, there is nothing to support it in the evidence.

The Court: Is there any way under our Statute, by which you can bring proceedings to declare a man legally dead in a Chancery proceeding?

The Court: Well, but isn't the right to do that confined to some sort of Probate proceedings under the Statutes? There is apparently in Iowa. What about Illinois?

The Court: I mean if you had the other question of jurisdiction disposed of could you do that in a Chancery proceeding?

The Court: If Senator Cowles' argument is sound on the question of jurisdiction, then there is no use of reviewing the record here, if it is a jurisdictional question primarily, there is no use going into a lot of other things.

Mr. Gary: Now, I want to just suggest this: I think it may apply on this particular proposition that you are now considering. Our Court, Supreme Court, holds rigidly that where there is a remedy at law, they will not permit a chancery court to take care of or adjudicate the matter. Now, that is a very recent case in the advance sheets. If it becomes necessary, I would like to produce it.

The Court: No, he said there was no evidence that she signed it, that anyone had seen her sign.

The Court: Isn't it necessary—and they can't presume, either, that he had no wife or children,—there is nothing in the record to show that he did or he did not, but I mean right at that point, the heirs themselves, the heirs constitute themselves as a sort of a court to pronounce him dead, and I don't think that they can do that.

The Court: Of course, what they should have done, I think so far as that is concerned, I think they should have

listed him as an heir, and then taken the necessary steps to call the Court's attention to the fact that he had been gone all those years, making such proof as the law required, and then get the Court, if they could, to make a finding that he was presumed to be dead and that he had no heirs and so forth and so on and then just put him out of the picture in that way. But can you do that in any way except by Order or Decree of a Court?

The Court: But I think that it can safely be said that until you get a court of some kind to pass upon it, either a Probate Court or a court of Chancery either here or there or somewhere that they could not at that time have taken for granted the presumption that Frank Tegtmeyer was legally dead. So that I think that right at that point, that is the reason I interrupted him at that point in his argument, you are basing what follows, I take it, on a premise which is not legally sound.

The Court: He was an heir, in fact, at that time, and the heirs by any agreement that they signed couldn't eliminate him. That is what I mean, don't you see?

The Court: But now, even though he is dead the Senator says, you can still go in, if you can show that there was fraud perpetrated upon the Court and make, or revive the liability under the bond, and make or compel a distribution of this amount, but before you could do that, in any event, anywhere, you would have to proceed to prove and establish it as a legal fact the death of Frank Tegtmeyer, in that there is only one place where you can properly do that, and that is in Iowa, but when you come here, you are doing something which belongs in another jurisdiction.

The Court: There is a good deal of conviction, that carries a good deal of conviction, that carries conviction, I think.

The Court: Well, I think that is jurisdiction. I think that is what you mean by the jurisdictional question. I think that is the whole jurisdictional question.

The Court: In other words, he says you are not in the right court. He says, you can't come into Illinois and do that at all.

The Court: Well, the only theory upon which you could have in any event, that you could pursue this trust is upon the theory that you can establish the fact that he is legally dead. Now, if the Court out there would say that you haven't shown that he was dead and you have not given proof, you have got to make further search, you have got to make proof of the fact here which will convince the court that he is legally dead and has no heirs,—until you do that I won't enter any such order and his distributive share is still part of this estate. If the court should hold that, then you couldn't come in here, even after the Master felt here that he was legally dead, and go ahead with your bill to sue for an accounting or under a trust, you would be stopped right there, wouldn't you?

The Court: Well, they are contending, where there is any fraud or irregularity practiced upon the court, that the Bonding Company, even though it is discharged, is still liable on the Bond; if there is any fraud practiced, that it revives the estate with the bond and everything.

The Court: Now, it is not easy for me to get over the notion that the place to prove the death of Frank Tegmeyer is in the Court where the estate is probated, because that is the original jurisdiction, and that is where this one-fifth or one-sixth share, whatever it is, originated, and where it has its situs and where the court had the power to dispose of it and do everything else in connection with it. Now, why should you come into any other jurisdiction when it belongs out there and when it is clearly provided in the

State of Iowa, that by Statute that certain steps shall and may be taken in order to declare a person legally dead; when you have never tried to do it out there, but you do not do so, you skip right over that, and you must know that, and then for the first time after the matter is here referred to a Master, you proceed to prove him legally dead. Before any rights could accrue under this contract, you would have to prove him, I think you would have to prove him, legally dead, but you assume that when you start your suit, when you file your bill.

The Court: Let me ask you this,—to the contention that this contract was made in October, whereas the property was sold and title delivered to the Tegtmeyers as joint tenants about two months before, that is, if Edward and Daisy Tegtmeyer acquired title to the property two months before this, then what is the theory upon which you make her liable by which you hope to bind her to this contract, see? I mean, that is one of their contentions.

The Court: I think it is an estate of a missing heir, which belonged the jurisdiction where the estate was probated, and could not be taken out of there until some showing had been made that that heir was not entitled to it.

The Court: That is the contention of the complainants here.

The Court: No, I have not considered that, but the point that was made yesterday, one of the points was that the property came into possession of Mr. and Mrs. Tegtmeyer, Edward Tegtmeyer, in August, and that she did not sign this agreement, if she signed it at all, until some time after the 20th of October, two months later. And I was wondering what your position would be to that, and how you would seek to hold her under this contract, which did not become effective until after she had acquired the property.

The Court: Well, now, suppose Frank Tegtmeyer should come back tomorrow and go out to Iowa and retain counsel and file a petition in which he would show to the court that the proof of heirship failed to mention him as one of the legal heirs of his father and mother, and that the distribution was made leaving out the share which rightfully belonged to him, and that a Fraud was practiced upon the Court in withholding from the court the fact that he was an heir, and no accounting made of his absence, and ask the court to set aside the order of distribution, and pray that his proportionate share be paid to him. Now, what would the court out there do?

The Court: Let us put ourselves in the position of the Court. Suppose you are sitting out there as the Judge of the Probate Court, and Frank Tegtmeyer comes along here by an attorney, and files a proper petition there. Well, now, of course, I think as a judge of the court out there it would be your duty, and you would be inclined to grant the relief, if you could, because he has been left out of the picture, from his point of view, his interest has just been wiped out. So that I think the first thing the court would do, would be to allow him to file the petition, then under that petition have him pray for some one as administrator in lieu of Edward Tegtmeyer. The court would do that. And then require first an amended table of heirship, showing he was an heir, and then get the surety company in, which would be within the jurisdiction of the Court, and probably order that the money, that a redistribution be made, and if it was not, if it could not be made, by the administrator who was then administrator, or the surety company to make good on it. I do not know whether they could do that under their rules out there. We can here. We can require surety companies qualified to act as surety companies in our court, we can enter orders against them. What would they do in a situation like this, where Edward Tegtmeyer is no longer living?

The Court: I think it is this, if there is a concurrent jurisdiction, you are right, but that is in a sense begging the question. The position they take is this, they say this is the estate of a person which belongs in the IOWA COURT, where it was administered, and no other court. You can't take part of an estate administered in one court, and then take it out of that court and into another STATE, into a DIFFERENT KIND OF COURT, and administer it there. That is the whole point to it, that this, having been probated in Iowa, where it properly belonged in the first instance, that final disposition, final cleaning up of it can only be made by that court, and by NO OTHER COURT. Why should any other court, undertake to in effect, dispose of the estate of a missing heir. When it came and should properly be done by the court which originally administered the estate.

Mr. Gary: I do, and the Judge does. Others have. If it is conceded, as I stated a moment ago, that they can go out there and proceed at law and have a remedy, then that ends it. Here is a decision, the 335 Illinois, page 533, right at the bottom.

The Court: You mean the general proposition, where there is an adequate remedy at law, a court of equity has no jurisdiction. Of course, the proposition that a court of equity has no jurisdiction where there is a complete and adequate remedy at law is well established.

OBJECTIONS TO REPORT OF MASTER.

STATE OF ILLINOIS }
COUNTY OF COOK } ss:

IN THE

CIRCUIT COURT OF COOK COUNTY

WILLIAM H. TEGTMEYER, ET. AL.	In Chancery
vs	Gen. No.
DAISY TEGTMEYER, ET. AL.	B-118301

BEFORE EDWIN A. MUNGER, MASTER IN CHANCERY

Comes now Daisy C. Tegtmeyer, one of the defendants, and makes the following OBJECTIONS to the report of the Master, herein filed.

On Page Two of the said report of the Master's statement, in reference to the pleadings, in the opinion of this defendant, are insufficient. The defendant believes that a brief synopsis of the issue should be stated by the Master in order that the report may be more easily understood and at the same time a copy of the reference should be set out in order that there may be clearly in the minds of the parties and the Court, the matters that were referred to the Master. This appears later in the Report but its omission renders the first part of the Report somewhat confusing.

The defendant objects to the first finding on Page Three, namely; that the Court has full and complete jurisdiction. This is a matter of law and not a matter referred to the Master, except to take evidence for its determination by

the Court. The specific facts giving jurisdiction should be shown. The evidence shows that this Court has no jurisdiction of the rem.

Page four, paragraph three of the findings, the Defendant deems the wording inaccurate. The final Report made in the Estate of Louise Tegtmeyer to the Probate Court of Des Moines County, Iowa, was approved, but the finding of the Master neglects to state that this Report made no mention of Frank Tegtmeyer, one of the sons of Louise Tegtmeyer. He was not named in the proceedings in the Probate Court. His share was not set apart for him or his heirs, nor was there an Administrator appointed to settle his estate as provided by the laws of Iowa the place of his domicile, if he were dead. These facts are all in the evidence and should be so stated.

In Paragraph four, the statement in regard to the share of Frank Tegtmeyer is again inaccurate, as above stated, and the motives attributed by the Master to Edward Tegtmeyer are mere conjectures, without support of the evidence. The agreement mentionel and which is later set out on Pages five and six, states that the Administrator "is *to retain Five Thousand ($5,000.00) Dollars out of the assets of the said Estate* (Henry Tegtmeyer), to be kept in some Bank or Trust Company," etc.

The Master in his findings in paragraph four on page four, states that each of his four brothers and sisters would contribute One Thousand ($1,000.00) Dollars each to the fund of Five Thousand ($5,000.00) Dollars. This statement is entirely inaccurate. The money was to be set aside at a future date and held by Edward Tegtmeyer, Administrator, for a period of ten years unless Frank Tegtmeyer was proven dead before the end of ten years. *The money was being held for Frank Tegtmeyer,* if he should appear within the ten year period. This agreement was executed

at Burlington, Des Moines County, Iowa and is governed by the law of Iowa.

No reference was made to Frank Tegtmeyer in the Probate proceedings in the Estate of Henry Tegtmeyer or in the Final Report. No attempt made to have him adjudicated dead as by law provided. No Administrator of his Estate was appointed, if he was, as now alleged, dead. He was an absentee. No notice was given as by law required. No opportunity given to his heirs, widow, creditor or executor to prove their relationship or present their claim. There was just a plain taking of his share by the other children without the knowledge or consent of the Court, after misleading the Probate Court of DesMoines County, by an erroneous statement as to the heirs of Henry Tegtmeyer, and a concealment of Frank Tegtmeyer's existence and rights. A fraud upon the Court and an intentional deception by all parties to the attempted settlement of Henry Tegtmeyer's Estate.

These facts are all in the record and should have been so stated by the Master.

The money was not contributed as stated. It had never been distributed. It was in the funds belonging to the Estate of Henry Tegtmeyer in the Bank at Burlington, Iowa in the name of the Administrator, as shown by the plaintiffs in the facts which they introduced in their attempt to follow the funds into the real estate in Chicago, Illinois. These facts should have been stated fully by the Master.

Edward Tegtmeyer wanted to be protected in his acts from the result of such a course of procedure and the plaintiffs joined with him in this unlawful taking of the funds belonging to Frank Tegtmeyer. The money did not belong to the signers of the agreement. It belonged to Frank Tegtmeyer or his legal representatives until he was adjudged dead and

the funds were distributed according to law. It is still his money and the plaintiffs have no right to maintain this action. They have not proven any right in themselves, or any of them, to any part of the fund. It was a conspiracy to mislead the court and to appropriate the funds of the absent brother, if living, and of his legal representatives and heirs, if dead. These facts all appear in the record and the Master should so find.

There is no evidence of diligent search for Frank Tegtmeyer. No compliance with the Statutes of Iowa, the place of his domicile, of giving notice as required by the Statute. No Administrator was appointed or asked for Frank Tegtmeyer's Estate. Just a plain disregard of the law and a surreptitious taking of his funds out of the hands of the Probate Court of DesMoines County, Iowa and distributing among themselves without consent or order of the Probate Court.

The Master further states that there is an assumption by reason of the long absence, that Frank Tegtmeyer is dead, *and left no heirs.* There is no presumption, legal or otherwise, that because the man is dead, he left no heirs or legal representatives, and his heirs or legal representatives would be entitled to his share, if he were dead.

There is no presumption, because a man is dead, that he left no heirs, widow or creditors, or legal representatives, any of whom would have their respective rights in his Estate. The conclusion of the Master, that the brothers and sisters were the heirs of Frank Tegtmeyer in the absence of any showing, is without foundation.

The Master states on Page six, he is unable to see any force in this contention for two reasons:

First: That the Trust agreement is definite in its terms and provides for the distribution of the funds in question in the event that Frank Tegtmeyer shall fail to appear and

claim the same. This hypothesis admits that Frank Tegtmeyer may be living, in fact it concedes for the purpose of the agreement that he was living at the time. The Master says that the parties to the agreement are estopped to deny its validity and force. This statement is inaccurate. The Trust Agreement is void, because it was a fraud upon the Probate Court of DesMoines County, made for an illegal purpose and was an attempt to divide up the property belonging to Frank Tegtmeyer without having him adjudged dead, or his estate administered.

Plaintiff was not coming into equity with clean hands, Equity will not enforce an agreement made to deceive the Court and to take the property of the absentee and distribute it among themselves.

Two: The Court has no jurisdiction of either the funds or the necessary parties to make a proper determination as to the rightful ownership of this fund that was a part of the estate of Henry Tegtmeyer and belonged to Frank Tegtmeyer, if living, if not, to his heirs and legal representatives.

Frank Tegtmeyer had not and has not been adjudged, dead. If an administrator should be appointed, as by law provided, his legal representatives, his widow, children or creditors, if any, would all have a right to appear and make claim to this fund. There must be an opportunity given, to show their rights. Should Frank Tegtmeyer appear later and demand this fund, the judgment or decree in this case would be no bar as to him. If he should be adjudged dead, and an administrator appointed, this fund would necessarily have to be paid to the administrator or to his widow or children and would be subject to the payment of his debts. Decree or judgment in this case would be no protection to Daisy C. Tegtmeyer. These facts and the law that necessarily follow from the facts should be stated in the Master's Report.

In Paragraph Eight, page seven, the Master finds, "that the written agreement was a formal statement of an oral agreement which had heretofore been made between the parties." There is no evidence to this effect. Edward Tegtmeyer is dead, and did not and could not testify and there is no evidence that can be admitted as against him, or as the custodian of this fund or against Daisy C. Tegtmeyer, his widow; who knew nothing of such alleged claim; attempting to show an oral agreement between the parties, one of whom is dead, that would modify the terms of the written agreement, and the evidence attempted to be introduced if competent, was wholly insufficient.

Daisy C. Tegtmeyer, defendant, objects to the findings of the Master as set forth in Paragraph Nine on page seven, as not supported by the evidence.

The same objection is made to Paragraphs ten, eleven, and twelve. There is no competent evidence introduced to support the findings made.

The findings in paragraph sixteen on page nine, that Daisy C. Tegtmeyer was fully informed of the Trust and conditions thereof and that she was a party signatory to the agreement, are unsupported by the evidence.

The evidence shows that she did not sign the agreement and had no knowledge of it until after the death of her husband. She was not in Iowa when it was made. The only testimony that she signed it, is that of William Tegtmeyer who stated that he would not sign it until after Daisy C. Tegtmeyer had signed, but the only copy of the agreement which bears what purports to be her signature, the signature of Daisy C. Tegtmeyer, is imposed upon and over the signature of William Tegtmeyer. This is shown by the proof of all the experts who examined the document. The testimony of William Tegtmeyer is clearly shown to be false leaving only the statement of Daisy C. Tegtmeyer,

that she did not sign it, before the court. Evidence of the experts is in no manner conclusive, the principal witness for the plaintiff, Mr. Ennis, stated that he would not have cashed a check of Daisy C. Tegtmeyer as signed in the manner on which it appears on the agreement. Another expert, Mr. Wood, testified that after a careful examination, he was unable to say that it was the signature of Daisy C. Tegtmeyer. Thus clearly leaving the matter in this position. The defendant denied her signature and there is no competent testimony to dispute it.

In finding nineteen on page ten the Master attempted to state the portion of the proceeds of the sale of the property which he finds the money belonging to Frank Tegtmeyer was invested, belonged to complainants, but he entirely disregards all items of expense, taxes, special assessments and costs of sale that were borne by the defendant Daisy C. Tegtmeyer and her husband Edward Tegtmeyer over a period of many years. But inasmuch as the matter of the value of this property was not referred to the Master, nor was the amount of the recovery referred to him, but simply whether or not there was a right of recovery, these findings may be disregarded as without the scope of the reference. If there is to be a finding of an amount or any amount in this case, that would have to be taken up in the Circuit Court on an accounting.

The finding in Paragraph twenty, is inaccurate and not in accordance with the evidence.

As to the findings in paragraph twenty-one, twenty-two, twenty-three, twenty-four and twenty-five, it is sufficient to say that there was no reference made to the Master to determine the amounts due from Daisy C. Tegtmeyer.

Daisy C. Tegtmeyer was compelled to deposit, by purchasers, with the Chicago Title and Trust Company the sum of Ten Thousand ($10,000.00) Dollars. The security

deposited with the Trust Company were, and are the property of Daisy C. Tegtmeyer and their kind and value does not enter into this controversy.

The findings of the Master as to paragraph twenty-six completely ignore Frank Tegtmeyer, his legal representatives, widow and heirs, as parties entitled to the fund, if Frank Tegtmeyer is living or dead. There is no right, shown in this action, in any of the complainants.

The brothers and sisters of a party have no interest in a fund belonging to him, if living, and if dead, no interest is in the brother, sister or other more distant relative until there is a showing that he left neither wife nor children, nor until there has been an Administration on his estate and an opportunity given for those lawfully entitled to assert their claim.

The review of the evidence on page 13 paragraph twenty-seven of the findings is entirely incompetent.

Many of the pertinent facts are omitted and others are given a meaning or significance, the reading of the evidence would not disclose. We ask that this finding be disregarded and the evidence insufficient.

The findings on page fourteen as to the tracing of the funds into various banks are inaccurate in this that it does not state that this fund was a part of the Estate of Henry Tegtmeyer, deceased, that it was withdrawn by the Administrator and is still in hand for the purpose of the Administration under the laws of the State of Iowa.

Disposition of the Estate of Louise Tegtmeyer, the Mother, was not fully made as found by the Master (sec. 2). William Tegtmeyer, complainant, finally, upon the witness stand, admitted that he held title to divers large tracts of real estate belonging to the Mother which were not administered upon by the District Court of Des Moines County, State of Iowa, and it does not appear that said

District Court was informed as to such real estate, neither was said Court informed as to the existence of Frank Tegtmeyer. There was no finding that he was absent nor "legally dead." The Master is in error when he says, at the end of Section 2, "upon the facts all parties are agreed."

Henry Tegtmeyer, the surviving husband and father, did not die October 7th, 1911 but died in October 1912. This is important only as a matter of relativity.

Objection is taken to the Master's statement, on page 4 section 4, first paragraph, when he states "and his Estate was duly administered in that Court." The evidence and record show it was not duly administered in "that Court." (Assuming that the Master means the District Court of DesMoines County, Iowa). Frank Tegtmeyer was an heir—he was an absentee—. These facts were known to complainants; they were not made known to the Court—; the knowledge of these facts were wilfully withheld from the Court;— the Estate was not administered in accordance with the laws of the State of Iowa. Frank Tegtmeyer, under the laws of Iowa, was presumed to be living and is so presumed until he is proven legally dead. The Court administering the Father's Estate was deceived by complainants and the District Court of DesMoines County, State of Iowa, at this time, has jurisdiction over all funds belonging to said Estate which have not been properly distributed.

The statement of the Master that Frank Tegtmeyer "was legally assumed to be dead" (page 5, paragraph 5) needs explaining. Only the Court by an adjudication could determine that Frank Tegtmeyer was "legally dead." For individuals to assume Frank Tegtmeyer was dead gave no rights or equities to anyone. The Court has not so adjudicated. Said Frank Tegtmeyer was absent from home at the time of the death of his Mother but his last

known residence was in DesMoines County, Iowa. So far as appears from the evidence, there is no competent showing that he was a bachelor at the time of his death, if dead; no showing that he died without issue surviving and no attempt has been made to have him adjudged dead or to settle his Estate and it must be presumed that he was living at the time of the death of his Father and Mother and is still living, an absentee.

The evidence shows that Daisy Tegtmeyer and her husband in 1913 sold real estate which they then owned jointly, took the proceeds of said sale together with other funds of their own, and bought vacant real estate in Chicago, Illinois. Daisy Tegtmeyer knew nothing of any agreement or alleged trust fund at that time and took title to said real estate with her husband jointly as an innocent party. She had no knowledge of the alleged transactions averred in this case. There was no agreement on her part to hold said vacant estate in trust. There was no agreement on her part, expressed, implied, resulting, constructive, *ex delicto* nor *ex malefacto* to so hold the property. She knew nothing of any other money being used as a part of the purchase price of said property. She was not a party signatory to said alleged agreement.

On page 14 paragraph 31 the Master again goes beyond the scope of the reference to him and also on page 15 in recommending the continuance of injunction. Defendant Daisy Tegtmeyer submits that said injunction should be dissolved.

The further findings in paragraphs twenty-nine, thirty and thirty-one are without foundation in fact or in law and were not within the scope with reference to the Master.

Complainants have a full, adequate and simple remedy at law. A good and sufficient bond was filed by the Administrator in the Estate of Henry Tegtmeyer. They can-

not usurp the authority of the Courts and make their own law.

This defendant contends that the findings of the Master should be that the plaintiffs have no right to maintain the action; that the necessary parties are not before the court for the proper determination of the controversy; that the funds in controversy should, and must be, treated as the property of Frank Tegtmeyer until he is adjudged dead and its distribution in accordance with law, and asks that the Master finds the facts in accordance with said request and recommends that the complaint be dismissed, for want of equity.

SIMON P. GARY
LAMONTE COWLES
Attorneys for Daisy C. Tegtmeyer

.....

STATE OF ILLINOIS }
COUNTY OF COOK } ss:

IN THE

CIRCUIT COURT OF COOK COUNTY

WILLIAM H. TEGTMEYER, ET AL., vs. DAISY TEGTMEYER, ET AL.	In Chancery Gen. No. B-118,301

OBJECTIONS OF DAISY TEGTMEYER, ONE OF THE DEFENDANTS, TO "ADDITIONAL FINDING" OF MASTER EDWIN A. MUNGER SUBMITTED TO HER JUNE 18TH, 1929.

Now comes Daisy Tegtmeyer by LaMonte Cowles and Simon P. Gary, her Solicitors, and objects to said "additional findings" because said "additional findings" assumes that said exhibit 7 was signed at the same time by all parties to it and is indefinte and ambiguous in that it does not state what Court had jurisdiction to make an equitable distribution; and, for the further reason that none of the conclusions, nor any of the findings in said "additional finding" contained, is or are supported by the evidence.

Reserving the right to file additional objections to said "additional finding" if deemed necessary.

Respectfully submitted,

LAMONTE COWLES,
SIMON P. GARY,
Attorneys for Daisy C. Tegtmeyer.

STATE OF ILLINOIS }
COUNTY OF COOK } ss:

IN THE

CIRCUIT COURT OF COOK COUNTY

WILLIAM H. TEGTMEYER, ET AL.,
vs.
DAISY TEGTMEYER, ET AL. } No. B-118301

FURTHER EXCEPTIONS TAKEN BY DAISY TEGTMEYER, ONE OF THE DEFENDANTS, TO THE REPORT OF EDWIN A. MUNGER, MASTER IN CHANCERY, TO WHOM THE ABOVE ENTITLED CAUSE WAS REFERRED.

Now comes Daisy Tegtmeyer, defendant in the above entitled cause, by LaMonte Cowles and Simon P. Gary, her Solicitors, leave of Court first had in this behalf, and takes further exceptions to the report of Edwin A. Munger, Master in Chancery, to whom said cause of motion had been referred to take testimony and report upon the alleged liability of defendant, Daisy Tegtmeyer, under the Bill of Complaint filed, and for further exception to said report said Daisy Tegtmeyer says as follows:

I.

The Master misapprehends the order of reference when he says, on page one, "The case was referred to me as a Master in Chancery to take the evidence and report as to whether or not the accounting prayed for should be had." Said order of Court reads as follows: "Take testimony herein according to law and report with all convenient speed his conclusions of law and fact on all issues of liability raised by the pleading, but not on any matters of accounting." The only ground for the alleged liability is

the alleged agreement offered in evidence in this case as complainant's Exhibit 7 and the Master should have reported to this Court his conclusion in reference to defendant Daisy Tegtmeyer's alleged liability under and by virture of said alleged agreement only that agreement says interest shall be added to amount mentioned in said alleged agreement; this is a matter of computation and not a matter of accounting. To arrive at the alleged total liability you would simply compute and add the interest and the Master should have so reported.

II.

The Master says, on page 2 under "PLEADINGS": "This is a bill to declare a trust and for an accounting." This is clearly a misapprehension of the pleadings. There is no reference in the pleadings to a resulting and/or implied trust. The prayer of the Bill reads: "FORASMUCH etc. * * * And set forth a true and perfect account of all the trust funds and effects received by Edward Tegtmeyer, deceased, by virtue of said Trust Agreement." This plainly refers to an alleged expressed trust based upon an alleged agreement, and plainly refers to an alleged existing trust and the alleged trust fund mentioned in this alleged agreement is the only trust fund referred to by the pleadings in this suit. There is no averment in the prayer of the Bill herein filed which asks the Court to "declare a trust" and the only averment in said prayer is that the Court enforce the alleged trust mentioned in said bill of complaint. The Master in his finding should so have reported to this Court.

III.

This Defendant takes further exception to said Master's Report and, in particular, to that part on page 7 first paragraph designated "SECOND". The Master's statement therein is incomplete. He should have added that Frank

Tegtmeyer was a Citizen of the State of Iowa at the time of his death, if he were, has since become, or is legally dead; that no Court of this State has the authority, power or jurisdiction to administer the Estate of a deceased person who never had been a resident of this State and who was at the time of his death a non-resident of this State, and furthermore should have stated that this Court could not and would not attempt to administer a fund which was in the possession, control and jurisdiction of the Courts of a Sister State, and further should have reported to this Court it had no jurisdiction in this cause of action to adjudicate or find Frank Tegtmeyer legally dead, nor to administer his Estate, nor to complete the administration of the Estate of Henry Tegtmeyer who was a resident of Iowa and where Estate was then being probated; that the District Court of Des Moines County, State of Iowa had and has full and complete jurisdiction of the subject matter mentioned in said alleged agreement and through its officers has title to said alleged "trust fund"; all of which facts appear from the evidence herein and are of record in this case and should have been so reported to this Court.

IV.

On page 9 paragraphs 13 and 14 the finding of the Master is incomplete to such an extent as to be misleading in that it omits to say that there was no sum of money mentioned in all the correspondence of Edward Tegtmeyer referred to by the Master, and is in error in finding that Daisy Tegtmeyer, the widow of the deceased, was the only heir-at-law and next of kin of said Edward Tegtmeyer, and it does not appear who his heirs-at-law and next of kin were, and the Master should have so reported to this Court.

V.

The Master says, on page 15 of his report under the title of "ADDITIONAL FINDINGS" that, at the time of the signing of the alleged contract Exhibit 7 and at the time of alleged closing of the Estate of Henry Tegtmeyer, in Burlington, Iowa, the said sum of Five Thousand Dollars had been taken by Edward Tegtmeyer who was then acting as Administrator of the Estate of Henry Tegtmeyer, deceased. The Master does not call the attention of the Court to the fact that the only evidence in the case upon which such statement could possibly have been based was the issuance of a Cashier's Check by the First Trust and Savings Bank of Burlington, Iowa in the sum of Eight Thousand Dollars, which said Cashier's Check was made payable to "Edward Tegtmeyer, Administrator", and was charged to the account of said Administrator in said First Trust and Savings Bank of Burlington, Iowa;

That the evidence in this case shows that subsequently to the issuance of said Cashier's check; which was August 16, 1913; on, to-wit; September 15th, 1913 said Administrator returned to said account Two Thousand Eighty-one Dollars and seventy-six cents and, on October of the same year, returned Two Thousand Six Dollars and October 18th returned the sum of One Thousand Three Hundred Twelve Dollars and sixty-five cents, all of which is shown by evidence introduced in this case by complainants. The Master should also have called this Court's attention that said money so taken by Edward Tegtmeyer as Administrator, was held by him as Administrator; and not personally; and he continued to hold it as Administrator as long as he was living, and the Master should have further reported unto this Court that the alleged closing of the Estate of Henry Tegtmeyer is not supported by the evidence in this case and that a careful perusal of Exhibit 7 shows that Edward Tegtmeyer, as Administrator, was to hold whatever fund was to

have been held under said alleged agreement Exhibit 7; that the Estate of Henry Tegtmeyer was never properly closed and that the representations made to said District Court in the State of Iowa in connection with the filing of a Final Account in said Estate were fraudulent and of no force and effect.

VI.

This defendant takes further exception to said Master's Report in that there appears, upon defendant's objections to the Master's tentative report filed with him, the word "overruled" repeatedly on the margin of each and every objection with the exception of one. The purpose of which is unexplained. This is not the usual, ordinary, customary or equitable procedure and we ask that the Court ignore the same. That the fees asked by said Master in his Report are excessive.

Respectfully submitted,

LaMonte Cowles
Simon P. Gary
Attorneys for Daisy C. Tegtmeyer

STATE OF ILLINOIS }
COUNTY OF COOK } ss:

IN THE

CIRCUIT COURT OF SAID COOK COUNTY

WILLIAM TEGTMEYER, ET. AL.
vs.
DAISY TEGTMEYER, ET. AL.
} No. B-118301

FURTHER EXCEPTIONS BY DAISY TEGTMEYER PRESENTED AFTER FURTHER AMENDMENTS TO THE AMENDED AND SUPPLEMENTAL BILL OF COMPLAINT BY COMPLAINANTS, AND BEFORE ENTRY OF DECREE.

Now comes this defendant Daisy Tegtmeyer by La Monte Cowles, Joseph Graber and Simon P. Gary, Solicitors, and shows unto this Court that subsequently to the filing of objections and exceptions to the Master's Report herein and subsequently to the filing of briefs herein by Counsel for their respective clients and parties to this suit; including this defendant; and after closing of all evidence and after all arguments before this Honorable Court had been made and closed, complainants filed their further amendments and supplement to their amended and supplemental bill of complaint as theretofore amended; in and by which said amendments and supplement complainants "struck out" parts of their amended and supplemental bill of complaint as amended, and added divers material averments thereto; to all of which this defendant has fully answered;

That by said amendment and supplement divers new issues are presented to this Honorable Court in and by which a new cause of action has been presented to this Honorable Court, and new elements and issues are now

being presented to this Honorable Court for the first time in the form of a draft of a decree now presented to this Court for its signature;

WHEREFORE, now comes this defendant, after the presentation of said draft of decree to this Court for its signature and entry, but/and before the same has been signed by this Court; and all matters hereinafter contained being herewith presented to and argued before this Court before decree is entered; and presents her further exceptions to the matters contained in said further amendments and supplement of complainants to their amended and supplemental bill of complaint; and, for such further exceptions this defendant says:

1. That she hereby reaffirms each and every objection and exception heretofore herein made and taken by her.

2. That there is no evidence to support finding number two in the proposed decree to the effect that Frank Tegtmeyer lived with his parents on a farm at any time; on the contrary, the evidence shows that Frank Tegtmeyer did not live with his parents and that he had no home in which to live, that his parents were estranged and did not live together.

3. That due and diligent search and inquiry has at no time been made to ascertain the whereabouts of said Frank Tegtmeyer, absentee; that there were no publications in "various newspapers and magazines," as set forth in said proposed decree as a finding; that no search nor inquiry, nor publications were had or made prior to the time of the death of his Mother.

4. That under the laws of the State of Iowa, introduced in evidence which govern in this case, Frank Tegtmeyer is presumed to be living even to this day and as such has a vested interest in and to the assets of his Father and Mother and it is beyond the jurisdiction

of this Court to divest him, a Citizen of a foreign State, of his vested interest.

5. There is no evidence which shows that Frank Tegtmeyer was a bachelor and left no issue surviving him at the time of his alleged or presumed or assumed death.

6. That Frank Tegtmeyer was a Citizen of the State of Iowa; that it is beyond the jurisdiction of this Court to find or adjudicate that said Frank Tegtmeyer was dead or presumed to be dead prior to the time of the death of his Father and/or prior to the time of the death of his Mother.

7. That it is beyond the jurisdiction of this Court to enter any Order that will in any way affect the property rights of said Frank Tegtmeyer or his heirs or assigns in the State of Iowa.

8. That the property and assets belonging to said Estates of Louise Tegtmeyer and Henry Tegtmeyer, as shown by this record, consists both of personal and real property situated in the State of Iowa; all of which is beyond the jurisdiction of this Court and is in contravention and in violation of the Fourteenth Amendment to the Constitution of the United States of America, and to find Daisy Tegtmeyer liable as proposed in the draft of decree now presented to the Court and to distribute said alleged fund as proposed by said draft, will be an attempt to deprive said Frank Tegtmeyer and/or his heirs and assigns of their vested property rights in said Estates and would take away the same without due process of law and this adjudication would be no defense on the part of this defendant in the event that Frank Tegtmeyer, or any other persons of interest, should hereafter make a claim against her.

9. That the District Court of DesMoines County, Iowa, sitting as a Probate Court administering Estates,

has at no time adjudicated Frank Tegtmeyer dead nor presumed to be dead and, under the laws of the State of Iowa, he is presumed to be living.

10. That Daisy Tegtmeyer is not liable as a wrong doer. The evidence shows beyond contradiction that she knew nothing about the alleged fund being used to purchase the real estate mentioned in this case and had no knowledge of the same until on or about the year 1923; that when said real estate was sold, more than the amount claimed by Complainants herein was set aside separated from all other funds derived from said sale and is now in the possession of the Chicago Title and Trust Company.

11. That said Daisy Tegtmeyer was an innocent purchaser of said premises and is not liable as a wrong doer and is not liable for any accumulations as contended by complainants in the draft of the proposed decree presented; that she has not misappropriated them or any part of them; that, under the laws of the State of Illinois and more particularly Section One (1) of Chapter fifty-nine (59), being an Act to revise the law in relation to frauds and perjuries, she cannot be held to answer for the debt, fraud or miscarriage of any other person.

12. That there is no evidence to support finding number three on page nine which omits the name of Frank Tegtmeyer as an heir of Louise Tegtmeyer, deceased, and which further states that her estate was duly and fully administered, and the evidence does not support finding number four on pages nine and ten in reference to the heirs-at-law and next of kin of Henry Tegtmeyer and the distribution of his Estate; that the evidence does not support finding number five on page ten thereof in reference to fraud being practised upon the District Court of Des Moines County, Iowa.

13. That the evidence does not support finding number six on pages ten and eleven thereof, and more particu-

larly in reference to an alleged oral agreement; the facts being that the evidence shows there was no oral agreement made, as claimed by complainants; and, further, that complainants, nor any one nor more of them, contributed the alleged sum of One Thousand Dollars ($1,000.00), or any other sum, to said alleged fund of Five Thousand ($5,000.00) Dollars; that Daisy Tegtmeyer was not a party to the alleged agreement in writing dated October 20th, 1913, that the evidence does not show nor warrant the finding that she signed said alleged agreement.

14. That there is no evidence to support finding number seven on page fourteen thereof, and more particularly the first part thereof.

15. That there is no evidence to support finding number eight on page fifteen thereof; that the same is argumentative and impertinent, indefinite and ambiguous.

16. That finding number eleven on page seventeen, and more particularly in the central part of page seventeen referring to the Chicago Title and Trust Company is argumentative, irrelevant, impertinent and not supported by the evidence.

17. That finding number twelve on page twenty-one thereof in reference to Stephen A. Clifford, I. Jay and Leo H. Weisfeldt is not supported by the evidence.

18. That there is no evidence to support finding number sixteen on page twenty-three thereof and that this defendant Daisy Tegtmeyer has at no time threatened or done anything whatsoever to prevent complainants and/or infant defendants from realizing anything to which they or any one or more of them may be entitled; that she at no time has transferred, secreted or taken away, hidden or done anything whatsoever to prevent complainants and

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

IN THE

CIRCUIT COURT OF COOK COUNTY

WILLIAM TEGTMEYER, ET AL.

vs.

DAISY TEGTMEYER, ET AL.

In Chancery
No. B-118301

MOTION OF DAISY TEGTMEYER TO SUSTAIN HER EXCEPTIONS AND DISAPPROVE OF MASTER'S REPORT AND DISMISS THE ABOVE CAUSE OF ACTION.

Comes now Daisy Tegtmeyer, one of the defendants in the above entitled cause, by Simon P. Gary and LaMonte Cowles, her Solicitors, and moves that her exceptions heretofore herein taken to the report heretofore herein filed by Edwin A. Munger; one of the Masters in Chancery of this Court; be sustained and that said Master's Report be disapproved and that the above cause of action be dismissed.

In support of this motion she humbly begs leave to call the Court's attention to the following as suggestive and pointing out a few of the major considerations in said exceptions contained:

I.

Title to the alleged "trust fund" has at no time passed to complainants nor any one of them. It remained and still remains in the Administrator of the Estate of Henry Tegtmeyer who was a resident of DesMoines County, Iowa at the time of his death.

II.

The situs of the property in question in this suit "alleged trust fund" is in the State of Iowa and is beyond the territorial jurisdiction of this Court; and is particularly under the jurisdiction and control of the District Court of Des Moines County, Iowa. It is the residue of the assets of the estate of said Henry Tegtmeyer, deceased.

III.

Complainants have an adequate remedy at law. A good and sufficient bond was filed by Edward Tegtmeyer, Administrator of the Estate of Henry Tegtmeyer, deceased. It has been offered in evidence herein by complainants, and has been received by the Master in Chancery and is a part of the record herein.

IV.

There is a fatal variance between the averments of the Bill of Complaint herein filed and the proof made in this case in that the alleged "trust fund" was never created. Edward Tegtmeyer, as Administrator of the Estate of Henry Tegtmeyer, deceased, held title to all the money of said Estate and, as said Administrator, held title to all the "fund" and property belonging to the Estate of Henry Tegtmeyer which was not distributed to the heirs at law and next of kin. No distribution of the remaining fund—alleged "trust fund"—was made. It was to be held and was held by Edward Tegtmeyer as Administrator of said Estate and not by Edward Tegtmeyer individually.

V.

The remainder of the Estate of Henry Tegtmeyer which was not distributed among the heirs-at-law and next of kin of said Henry Tegtmeyer, by Edward Tegtmeyer, Adminis-

trator, was part of the share of Frank Tegtmeyer, absentee. No legal distribution of this sum could be made until a Court of competent jurisdiction had adjudicated Frank Tegtmeyer as being "legally dead" (or by proceeding under the code of the State of Iowa to distribute the Estates of absentees). This Court has no jurisdiction to adjudicate Frank Tegtmeyer legally dead because of his absence and is without jurisdiction to administer the Estate of a citizen of a Sister State. Both of these are beyond the territorial jurisdiction and scope of the bill in this case, and complainants should be left to their own domestic Court in the State of Iowa to complete the administration of said Estates and compel a complete accounting from *all parties including the complainant,* William Tegtmeyer who held title to real estate belonging to the Mother, Louise Tegtmeyer, at the time of her death—and has not been accounted for, and has not been reported to any Court for adjudication.

VI.

The Master herein had no right, authority nor jurisdiction to find "That said Frank Tegtmeyer is presumed to be legally dead"; such finding in this case is beyond the scope of the reference to him: is beyond the jurisdiction of the Master and Court in this case. Frank Tegtmeyer, under the evidence in this case, is presumed to be living and will so continue until a court of competent jurisdiction will adjudicate and declare him "legally dead" or the equivalent thereof. The code of the State of Iowa; introduced in evidence herein; was enacted to meet just such a situation as this.

VII.

The bill herein was filed to enforce an alleged trust, alleged to have been created by an alleged agreement; Complainants' Exhibit Seven (7). (See Defendants' Ex-

hibit Seven (7)). This Court is asked to enforce an expressed trust.

VIII.

Frank Tegtmeyer, absentee,—was a resident of Iowa. His last known residence was in Iowa;—never was a resident of Illinois. If dead—(but he is not)—legally or naturally,—he died a resident of Iowa.—The Courts of the State of Iowa have exclusive jurisdiction to administer the Estates of its citizens dying within its borders.

IX.

That after the issuance of a Cashier's check in the sum of $8,000.00 payable to "Edward Tegtmeyer, Administrator"—on Aug. 16th, 1913, said Administrator returned to said account in said bank to the credit of Henry Tegtmeyer Estate, the total sum of Sixty-Seven Hundred Thirteen Dollars and forty-one cents ($6713.41). That the above $8,000.00 was taken as Administrator, held by him as Administrator and the above $6,713.41 was returned to the bank account as Administrator. The alleged trust fund of Five Thousand Dollars was never set aside.

X.

That said alleged agreement (Exhibit 7) was executed in the State of Iowa—and the code of the State of Iowa became a very material part of said agreement (Ex. 7). The agreement of its self is silent as to how an alleged distribution should be made after the expiration of ten years. The Iowa Code—introduced in evidence herein—intervenes and directs the distribution, and this is the only way a legal distribution can be made—any other procedure would not be *res adjudicata.*

XI.

That complainants and neither one nor more of them come into Court with clean hands.—That the alleged agreement (Ex. 7) was entered into by them and each of them for the purpose of defrauding, misleading and misguiding the Court of Des Moines County, Iowa—and, in connection with the execution thereof, did wilfully, falsely, unlawfully and fraudulently represent unto said Court that the assets of said Estates had been fully collected—and fully distributed to the heirs-at-law and next of kin of said Henry Tegtmeyer—when, in fact, they had not been—and then and there, as aforesaid, did not name Frank Tegtmeyer (an absentee) as an heir-at-law and next of kin.

XII.

That they and each of them then and there wilfully, falsely, unlawfully and fraudulently, represented that all heirs-at-law had been paid their respective distributive shares of the Estates of Henry Tegtmeyer when, in fact, no distributions had been made to Frank Tegtmeyer, son of said Henry Tegtmeyer, deceased, nor to his heirs, legal representatives, assigns, nor creditors as is shown by said agreement—Complainants' Exhibit No. 7.

XIII.

That the above and foregoing wilful, false, unlawful and fraudulent representations were against public policy and complainants cannot ask that a Court of equity give them aid to enforce an agreement of that nature.

XIV.

That the above and foregoing wilful, false, unlawful and fraudulent representations were known to each of

complainants and they do not come into this Court of equity with clean hands.

XV.

Daisy Tegtmeyer did not sign the alleged agreement (Ex. 7). The only evidence on this question is the testimony of William Tegtmeyer—who never saw her write her name—Daisy Tegtmeyer—who says she did not sign it,—and two experts on handwriting—one of whom said on cross examination that he would make investigation before he would cash a check on the signature on Ex. 7. The other expert found too many variations to form an opinion that it was her signature.

XVI.

There was no verbal agreement preceding the signing of alleged agreement Ex. 7—herein. All evidence on this subject and/or allied thereto is short and is found on pages 109, 117, 401, 402, 720 and 715.

XVII.

Edward Tegtmeyer, Administrator of the Estate of said Henry Tegtmeyer, has at no time been divested of the title to said alleged fund. If there be any other opinion—answer—How? When?

XVIII.

The above and foregoing are respectfully submitted without waiving any of the exceptions heretofore herein taken to said Master's Report.

This defendant Daisy Tegtmeyer, further moves that the Order heretofore herein entered restraining her from disposing of and/or selling twenty-five (25) shares of American Telephone and Telegraph Company stock, and re-

straining her and the Chicago Title and Trust Company from disposing of and selling certain shares of Commonwealth Edison Company stock; be vacated, set aside of no further force or effect.

Respectfully submitted,

DAISY C. TEGTMEYER.

STATE OF ILLINOIS } ss.
COUNTY OF COOK }

IN THE

CIRCUIT COURT OF COOK COUNTY

WILLIAM H. TEGTMEYER, ET. AL.
vs.
DAISY TEGTMEYER, ET. AL.
No. B-118301

THE FURTHER ANSWER AND PLEA OF DAISY TEGTMEYER, DEFENDANT, TO COMPLAINANTS' AMENDED AND SUPPLEMENTAL BILL OF COMPLAINT AS NOW AMENDED.

Now comes Daisy Tegtmeyer, one of the defendants in the above entitled cause, leave of Court first had in this behalf, and further answers Complainants' Amended and Supplemental Bill of Complaint as now amended, and for further answer thereunto:

Denies that diligent search and/or inquiry has been made to find said Frank Tegtmeyer and/or to ascertain his whereabouts since the date of his disappearance; and denies that said Frank Tegtmeyer is legally presumed to be dead; denies that he is legally presumed to have died prior to the time of the death of his Mother; and denies that Frank Tegtmeyer died prior to the time of the death of his Mother; and denies that he was a bachelor and left no issue surviving him, as averred by said Complainants; and, further denies; that said Frank Tegtmeyer is legally presumed to have died prior to the time of the death of his Father; and denies that said Frank Tegtmeyer died prior to the time of the death of his Father; and denies that Frank Tegtmeyer was a bachelor and left no issue surviving him, as averred by said Complainants.

This defendant, as a further defense in this behalf, avers that said Frank Tegtmeyer was a resident of the State of Iowa; that his last known domicile was in the State of Iowa; that he was never a resident of the State of Illinois; that it is beyond the jurisdiction and power of this Court in this couse of action to find or adjudicate that Frank Tegtmeyer was dead and/or presumed to be dead before the time of the death of his Mother, Louise Tegtmeyer, and likewise is beyond the jurisdiction and power of this Court to find and/or adjudicate that said Frank Tegtmeyer was dead and/or presumed to be dead prior to the time of the death of his Father; that it is beyond the jurisdiction of this Court to enter any Order that will in any way affect the property rights of said Frank Tegtmeyer or his heirs or assigns in the State of Iowa; that this Court has no power nor jurisdiction to disinherit Frank Tegtmeyer and/or his heirs-at-law and has no power nor jurisdiction to prevent him nor his heirs-at-law from legally demanding, taking and inheriting his and their respective shares of the respective Estates of said Louise Tegtmeyer and said Henry Tegtmeyer, Mother and Father respectively of said Frank Tegtmeyer absentee; and this Court has no power nor jurisdiction to divest said Frank Tegtmeyer and/or his heirs or assigns of their respective vested interests in and to said Estates of Louise Tegtmeyer and Henry Tegtmeyer, which said Estates consisted of and consists of—as is shown by the record herein—both personal and real property situated in the State of Iowa; all of which is beyond the jurisdiction of this Court and is in contravention of the Constitution of the United States and Section One (1) of Article Fourteen (XIV) thereof; and would be an attempt to deprive said Frank Tegtmeyer and/or his heirs and assigns of their respective vested property rights in said Estates and take away the same without due process of law.

And for further defense herein this Defendant shows that the District Court of Des Moines County, Iowa, sitting at a Probate Court, has at no time adjudicated Frank Tegtmeyer dead nor presumed to be dead and that under the laws of the State of Iowa herein pleaded and offered in evidence, Frank Tegtmeyer is presumed to be living;

And for a further defense herein this defendant shows unto this Honorable Court that she is an innocent purchaser of the real estate described in the Amended and Supplemental Bill of Complaint herein; that she had no knowledge of the acts and doings of Edward Tegtmeyer, her late husband, in connection with the purchase of said real estate; that under the Laws of the State of Illinois, and more particularly Section One (1) of Chapter fifty-nine (59) of the Revised Statutes of the State of Illinois; being an Act to revise the law in relation to frauds and perjuries, this defendant cannot be held to answer for the debt, fraud or miscarriage of any other person or upon any agreement that is not to be performed within the space of one year from the making thereof unless the promissory agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.

And this Defendant will ever pray as first above prayed herein.

DAISY C. TEGTMEYER.

STATE OF ILLINOIS } ss.
COUNTY OF COOK }

IN THE

CIRCUIT COURT OF COOK COUNTY

WILLIAM H. TEGTMEYER, ET. AL.
vs.
DAISY TEGTMEYER, ET. AL.
No. B-118301

PETITION.

To the Honorable Hugo Friend,
One of the Judges of Said Circuit Court:

Your Petitioner, Daisy Tegtmeyer, respectfully shows unto this Honorable Court that she is one of the defendants in the above entitled cause; that she has entered her appearance therein and has actively defended her interests in the above entitled cause; that she has filed objections to the Master's Report herein filed and has filed exceptions to the Master's said Report and has filed her Briefs on the legal propositions as requested by this Honorable Court; that

Subsequently to a hearing before this Honorable Court on all the issues pertaining thereto, Complainants did, on the 10th day of January 1930, without notice in writing, file an Amendment to their Amended and Supplemental Bill of Complaint thereby materially changing the procedure herein;

Wherefore Defendant prays that an Order be entered by this Honorable Court giving her leave to file further Exceptions to said Master's Report, the substance of which further Exceptions are that this Court has no jurisdiction to adjudicate nor find that Frank Tegtmeyer, an

absentee whose last known domicile was in the State of Iowa, was legally dead or presumed to be dead, and has no power nor jurisdiction to disinherit him nor his heirs-at-law, and no power nor jurisdiction to divest him nor his heirs of a vested interest; that any such action would be in contravention of the Constitution of the United States, more particularly Article fourteen (XIV) thereof, and further that this defendant cannot be held for the wrong doings of Edward Tegtmeyer, her deceased husband; that Defendant is not liable for the wrong doing of any other person, the same being prevented under the Statutes of the State of Illinois in such case made and provided, more particularly Chapter fifty-nine (59) Section One (1) of the Illinois Revised Statutes.

And this defendant will ever pray.

DAISY C. TEGTMEYER.

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

Daisy Tegtmeyer, being first duly sworn, deposes and says that the facts set forth above are true.

DAISY C. TEGTMEYER.

Subscribed and Sworn to before
me this 10 day of January 1930.

.....

Notary Public.

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

IN THE

CIRCUIT COURT OF SAID COOK COUNTY

WILLIAM TEGTMEYER, ET. AL.
vs.
DAISY TEGTMEYER, ET. AL.

In Chancery
No. B-118301

FURTHER EXCEPTIONS TAKEN BY DAISY TEGTMEYER, DEFENDANT, TO THE REPORT OF EDWIN A. MUNGER, MASTER IN CHANCERY TO WHOM THE ABOVE ENTITLED CAUSE WAS REFERRED.

Now comes Daisy Tegtmeyer, defendant in the above entitled cause, by LaMonte Cowles, Joseph Graber and Simon P. Gary, her Solicitors; leave of court first had in this behalf, and takes further exception to the report of Edwin A. Munger, Master in Chancery to whom said cause had heretofore herein been referred to take testimony and report to this Honorable Court upon the alleged liability of said defendant; and for further exception to said report Daisy Tegtmeyer says:

I.

There is not sufficient evidence to support a finding in this case that due and diligent search and/or inquiry has been made to find said Frank Tegtmeyer and/or to ascertain his whereabouts since the date of his disappearance; that there is no evidence that Frank Tegtmeyer is legally presumed to be dead and no evidence that he was presumed to have died prior to the time of the death of his Mother; no evidence that Frank Tegtmeyer died prior to the time of the death of his Mother; that there is no

evidence that Frank Tegtmeyer was a bachelor, left no issue surviving him; that there is no evidence that Frank Tegtmeyer was legally presumed to have died prior to the time of the death of his Father; and that there is no evidence that Frank Tegtmeyer died prior to the time of the death of his Father.

II.

That it is beyond the jurisdiction of the Master in Chancery and beyond the jurisdiction of this Court to find or adjudicate that Frank Tegtmeyer was dead or presumed to be dead before the time of the death of his Mother and/or before the time of the death of his Father.

And it is further beyond the jurisdiction of said Master and/or this Court to find or adjudicate that said Frank Tegtmeyer had no vested right in or to the Estates respectively of said Louise Tegtmeyer and said Henry Tegtmeyer, his parents, and it is beyond the jurisdiction of said Master and/or this Court to divest said Frank Tegtmeyer of his vested interests in and to said Estates respectively of his Father and Mother and the property belonging to said Estates which said properties were, are and always have been situated in the State of Iowa, all of which is beyond the jurisdiction of said Master and this Court and is in contravention of the Constitution of the United States and more particularly Section One (1) of Article Fourteen (XIV) thereof and would be an attempt to deprive said Frank Tegtmeyer and/or his heirs-at-law and assigns of their respective vested property rights in said Estates and take away the same without due process of law.

III.

That neither said Master nor this Court has jurisdiction to adjudicate any reference to said rights of said

Frank Tegtmeyer, absentee, and his heirs, for the reason there is no evidence in this case showing that the District Court of Des Moines County, sitting as a Probate Court, has at any time adjudicated or found that said Frank Tegtmeyer was legally dead or presumed to have been dead and that under the Laws of the State of Iowa Frank Tegtmeyer is presumed to be living.

IV.

The Master, in his Report, erred in finding that Daisy Tegtmeyer was liable by virtue of the fact that she was joint tenant and owner of the real estate described in the Amended and Supplemental Bill of Complaint herein filed by Complainant; that Daisy Tegtmeyer had no knowledge of the acts and doings of Edward Tegtmeyer, her late husband, in connection with the purchase of said real estate and under the laws of the State of Illinois and more particularly Section One (1) of Chapter Fifty-nine (59) of the Revised Statutes of the State of Illinois, this defendant cannot be held to answer for the debt, fraud or miscarriage of her late husband, Edward Tegtmeyer in this case. That there is no evidence to support the finding of the said Master that this defendant was so liable.

Respectfully submitted,

DAISY C. TEGTMEYER.

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

WILLIAM HOWARD KENNER, being duly sworn, deposes and says:

I am a duly licensed physician in the State of Illinois, County of Cook, maintaining an office and hospital at 716 West Wellington Avenue, Chicago, Illinois.

That I examined Mrs. Daisy C. Tegtmeyer on June 28, 1940 and hereby certify that her physical condition is as follows:

1. Old Fiberous Tuberculosis
2. Myocardial Degeneration
3. Secondary Anemia—severe
4. Arterio-Sclerosis—Advanced
5. Chronic Gastritis
6. Otosclerosis
7. Chronic rhinitis and Nasophosyngitis

Laboratory and X-Ray confirmed the above findings.

I further certify that it is my opinion from the symptoms shown by the above examination and laboratory and X-Ray findings that further confinement in a jail or other similar institution would result in the very early death of the above named person.

(Signed) WILLIAM HOWARD KENNER, M.D.

Subscribed and sworn to before me a Notary Public in and for the County of Cook, State of Illinois, this 29th day of June, A.D. 1940.

(Signed) RUDY J. O'DONNELL,
Notary Public.

My commission expires May 5, 1944.

Respectfully submitted,
DAISY C. TEGTMEYER,
Petitioner.

JOSEPH HELLER,
Attorney for Petitioner.

FILED
APR 8 1941
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 831

WILLIAM H. TEGTMEYER, ET AL.,
Respondents,

vs.

DAISY C. TEGTMEYER,
Petitioner.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

L. DUNCAN LLOYD,
135 S. La Salle Street,
Chicago, Illinois,
Attorney for Respondents.

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SUBJECT INDEX.

	PAGE
Brief	1
Points and Authorities	2, 3
I. No Federal Question Has Been Saved	2, 4
(A) It must appear from the record that a Federal question was presented for decision	2, 4
(B) It must appear from the record that decision of the Federal question was necessary to a determination of the cause	2, 8
(C) Petitioner by her appeal to the Appellate Court of Illinois waived any question as to a violation of her constitutional rights	2, 9
II. No Substantial Federal Question Has Ever Been Raised In This Cause	3, 10
(A) The Eighth Amendment to the Constitution of the United States applies only to the National Government and does not apply to the State Government	3, 10
(B) Imprisonment for civil contempt until the contemnor complies with the order of court does not violate the provisions of the Fourteenth Amendment to the Constitution of the United States	3, 11
Argument	4

TABLE OF CASES.

Bennett v. Weber, 323 Ill. 283	8
Collins v. Johnston, 237 U. S. 502 (59 L. ed. 1071)	11
DeGrasse v. Gossard Co., 236 Ill. 73	8

PAGE

TABLE OF CASES (continued).

Ex Parte Spies, 123 U. S. 131 (31 L. ed. 80) 10

Gray v. Ames, 220 Ill. 251 8

Honeyman v. Hanan, 300 U. S. 14; (81 L. ed. 476) 5, 8

L. & N. R. R. v. Woodford, 234 U. S. 46 (58 L. ed. 1202) 10

People v. Lawson, 351 Ill. 507 10

People v. Rosenthal, 370 Ill. 244 9

People v. Terrill, 362 Ill. 61 10

Stovall v. Banks, 77 U. S. (10 Wall.) 583 (19 L. ed. 1036) 7

Thompson v. Dean, 74 U. S. (7 Wall.) 342 (19 L. ed. 94) 6

Tinsley v. Anderson, 171 U. S. 101 (43 L. ed. 91) 11, 12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 831

WILLIAM H. TEGTMEYER, ET AL.,
Respondents,

vs.

DAISY C. TEGTMEYER,
Petitioner.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

The respondents, Minnie Tegtmeyer, Administratrix of the Estate of William H. Tegtmeyer, deceased, Louis J. Boock and Philip F. Abboud, Executors of the Last Will and Testament of Anna L. Boock, deceased, William White, Wesley White, George White, Robert White, Louise A. Taubert and Albert Nave Wilson, respectfully ask that the petition of Daisy C. Tegtmeyer for writ of certiorari to review the orders of the Appellate Court of Illinois, First District, be denied for the following reasons:

I.

NO FEDERAL QUESTION HAS BEEN SAVED.

(A) It must appear from the record that a Federal question was presented for decision.

Honeyman v. *Hanan*, 300 U. S. 14; (81 L. ed. 476).

Thompson v. *Dean*, 74 U. S. (7 Wall.) 342 (19 L. ed. 94).

Stovall v. *Banks*, 77 U. S. (10 Wall.) 583 (19 L. ed. 1036).

DeGrasse v. *Gossard Co.*, 236 Ill. 73.

Gray v. *Ames*, 220 Ill. 251.

Bennett v. *Webber*, 323 Ill. 283.

(B) It must appear from the record that decision of the Federal question was necessary to a determination of the cause.

Honeyman v. *Hanan*, 300 U. S. 14; (81 L. ed. 476).

(C) Petitioner by her appeal to the Appellate Court of Illinois waived any question as to a violation of her constitutional rights.

People v. *Rosenthal*, 370 Ill. 244.

People v. *Terrill*, 362 Ill. 61.

People v. *Lawson*, 351 Ill. 507.

L. & N. R. R. v. *Woodford*, 234 U. S. 46 (58 L. Ed. 1202).

II.

NO SUBSTANTIAL FEDERAL QUESTION HAS EVER BEEN RAISED IN THIS CAUSE.

(A) The Eighth Amendment to the Constitution of the United States applies only to the National Government and does not apply to the State Government.

Ex Parte Spies, 123 U. S. 131 (31 L. ed. 80).

Collins v. *Johnston*, 237 U. S. 502 (59 L. Ed. 1071).

(B) Imprisonment for civil contempt until the contemnor complies with the order of court does not violate the provisions of the Fourteenth Amendment to the Constitution of the United States.

Tinsley v. *Anderson*, 171 U. S. 101 (43 L. ed. 91).

ARGUMENT.

I.

NO FEDERAL QUESTION HAS BEEN SAVED.

(A) It must appear from the record that a Federal question was presented for decision.

The petition does not anywhere indicate when and how a Federal question was saved except by reference to the opinion of the Appellate Court of Illinois, in 306 Ill. App. 169 and in 292 Ill. App. 434.

The only reference we find in the opinion in 306 Ill. App. is to the effect that the defendant (Daisy C. Tegtmeyer, petitioner herein) contends that the decree of March 18, 1930, and consequently the *ne exeat* and contempt orders ancillary to it, are void because the courts of Illinois have never had jurisdiction of the subject matter of the proceeding. Some reference is there made to the powers of the Circuit Court of Illinois under the Illinois Constitution but no reference is made to the Federal Constitution. The opinion of the Appellate Court of Illinois, in 292 Ill. App. 434, states that the defendant contends that the court erred in not quashing the "contempt mittimus" because the punishment inflicted upon her is cruel and unusual and contrary to the Eighth Amendment of the United States Constitution and to certain sections of the Constitution of Illinois, and "that she has been deprived of her liberty without due process of law, contrary to the Fifth and Fourteenth Amendments to the United States Constitution."

There is no suggestion as to the circumstances constituting a want of due process. The burden is on the partitioner to show in what manner her constitutional rights have been violated. She has not made such showing by merely referring to some section of the Constitution and by implication inviting the court to review the record and find some violation of her constitutional rights. In *Honeyman* v. *Hanan,* 300 U.S. 14 (81 L. ed. 476), at page 18 (479), the court said:

> "Before we may undertake to review a decision of the court of a State it must appear affirmatively from the record, not only that the Federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the Federal question was necessary to the determination of the cause. *Lynch* v. *New York,* 293 U.S. 52, 54, 79 L. ed. 191, 192, 55 S. Ct. 16, and cases there cited."

If the Federal question were raised in the case decided in *Tegtmeyer* v. *Tegtmeyer,* 292 Ill. App. 434, the decision of the Appellate Court there reported was made and became final in December, 1937. The petition for leave to appeal to the Supreme Court was denied in the early part of 1938. The time for making an application for certiorari to review that decision expired 3 months after the entry of the judgment.

The subject matter of the jurisdiction of the Illinois courts was adjudicated in the decree of March 18, 1930, which was affirmed by the Appellate Court of Illinois in *Tegtmeyer* v. *Tegtmeyer,* 259 Ill. App. 661, and by the Supreme Court of Illinois in *Tegtmeyer* v. *Tegtmeyer,* 348 Ill. 434, which decided in 1932 all questions between the parties except as to the amount the complainants were entitled to recover, which was to be determined by the Master upon a re-reference for the purpose of taking and stating

an account. Since the judgment became final in 1932 the time for making application for certiorari on that decision has long since expired. Petitioner says on page 12 of her brief in support of her petition that certiorari could not have issued to the Supreme Court of Illinois to review the decree of March 18, 1930, affirmed in *Tegtmeyer* v. *Tegtmeyer,* 348 Ill. 434, for the reason that the decree then under review was interlocutory in nature, and cites *Gant* v. *Oklahoma,* 284 U.S. 594. The case cited merely says that the appeal was dismissed for want of jurisdiction without specifying the circumstances indicating the lack of jurisdiction. The decision of the Oklahoma Supreme Court, 150 Okla. 86, 6 P(2d) 1065, indicates that the appeal was from an order granting a temporary injunction. An order granting a temporary injunction is always granted to preserve the *status quo* pending the final determination of a case. Under the Illinois practice, a decree requiring a litigant to account and stating the manner in which the account should be taken is regarded as a final decree. By the decree of March 18, 1930, the court decreed that Daisy C. Tegtmeyer (petitioner herein) was a *trustee de son tort* and certain securities constituted a trust fund, some of which are mentioned in *Tegtmeyer* v. *Tegtmeyer,* 292 Ill. App. 434, at page 437. The only thing remaining to be done was to take the accounting pursuant to the decree of March 18, 1930. If the decree of March 18, 1930, was not final for the purpose of giving this court jurisdiction to review the decree by certiorari, then there was no final decree at the time of the filing of the petition herein, which would give this court jurisdiction to review the proceedings by certiorari.

In *Thompson* v. *Dean,* 74 U.S. (7 Wall.) 342, 19 L. ed. 94, the decree directed the defendant therein to transfer forthwith certain shares of stock to certain plaintiffs therein and directed that an account be taken and stated as to

the amount paid and to be paid for the stock and as to dividends accrued and to be credited under the contracts between the parties. The decree, for the purpose of giving jurisdiction to the Supreme Court, was held to be final. In *Stovall* v. *Banks,* 77 U. S. (10 Wall.) 583, 19 L. ed. 1036, the decree adjudged that certain assets were in the hands of the administrator and ordered distribution thereof and directed the issuance of execution for the respective sums due the several distributees. The decree after fixing the respective amounts due and directing the issuance of execution, went on to direct that the administrator be allowed the principal and interest of any note held by him against any of the several distributees, and directed that the several sums should be subjected to ratable deduction for fees yet unpaid for the collection of notes belonging to the administrator. In deciding that the decree was a final decree notwithstanding the amounts to be later determined, the court said:

> "It is not unusual in courts of equity to enter decrees determining the rights of parties, and the extent of the liability of one part to the other, giving at the same time a right to apply to the court for modifications and directions. It has never been doubted that such decrees are final."

The instant suit was among other things for an accounting. The decree which is the subject matter of the appeal in 348 Ill. 434 required Daisy Tegtmeyer (petitioner herein) to account, specified the manner in which the account should be taken and referred the matter to a Master to take and state the account. The decree was final and appealable under the law of Illinois. Daisy Tegtmeyer appealed from that decree to the Appellate Court (259 Ill. App. 661, decided 1930) and, upon its affirmance there, she appealed to the Supreme Court (348 Ill. 434, decided 1932). The

practice is discussed in *DeGrasse* v. *Gossard Co.*, 236 Ill. 73, where the court, among other things, quotes from *Gray* v. *Ames*, 220 Ill. 251, as follows:

> "'A final decree is one which fully decides and finally disposes of the entire merits of the case. Some other order or decree of the court may be necessary to carry into effect the rights of the parties or some incidental matter may be reserved for consideration, which decision, either one way or another, cannot have the effect of altering the decree by which the rights of the parties have been declared. A decree is final even where, as a mere incident to the relief granted, it directs a reference to a master to state an account. Where accounts are to be settled between the parties and the decree contains an order of reference by which the accounts are to be stated according to certain principles fixed by the decree, such order of reference will not have the effect of rendering the decree interlocutory.'"

To the same effect see *Bennett* v. *Weber*, 323 Ill. 283, at pages 292 and 293.

(B) It must appear from the record that decision of the Federal question was necessary to a determination of the cause.

The language above quoted from *Honeyman* v. *Hanan*, 300 U. S. 14 (81 L. ed. 476), on page 5, clearly shows that the record must not only show affirmatively that the Federal question was presented but must also show that the decision of the Federal question was necessary to a determination of the case. The judgment of the Illinois courts, which petitioner seeks to have reviewed by her petition for certiorari, is the judgment entered in June, 1940, reported in 306 Ill. App. 169. In the decision the court in effect decided that all matters sought to be raised had been

previously decided by that court upon a previous appeal and that the law does not permit reviewing cases by piecemeal. Not only does the record fail to show that any Federal question was presented, but it affirmatively appears that the decision of a Federal question was not necessary for a determination of the cause. The court might well have decided, and did decide, that the court was precluded from reviewing the case because all matters presented had previously been decided.

(C) Petitioner by her appeal to the Appellate Court of Illinois waived any question as to a violation of her constitutional rights.

Under the Illinois practice, cases involving constitutional questions are appealed directly to the Supreme Court of the state and it has been repeatedly held that an appeal to the Appellate Court operates as a waiver of any constitutional question.

In *People* v. *Rosenthal,* 370 Ill. 244, Rosenthal was found guilty of contempt and sentenced to 3 days in the county jail. An appeal was taken to the Appellate Court where the judgment was affirmed and a writ of error was sued out of the Supreme Court. In its decision, the court there said at page 247:

> "The first two contentions present constructions of the constitution. The Civil Practice act (Ill. Rev. Stat. 1937, chap. 110, par. 199) requires that all cases in which constitutional questions are raised must be taken directly to this court for review. If such a case is taken to the Appellate Court and other errors are assigned of which that court has jurisdiction, the plaintiff in error or appellant is held to have waived the constitutional questions. (*People* v. *Terrill,* 362 Ill. 61, and cases there cited.) The constitutional questions urged by plaintiffs in error cannot be considered."

There are numerous decisions to the same effect, including *People* v. *Terrill*, 362 Ill. 61 and *People* v. *Lawson*, 351 Ill. 507.

The federal question must be preserved in accordance with the rules of the state practice. In *Louisville & Nashville R. Co.* v. *Woodford*, 234 U. S. 46 (58 L. ed. 1202) at page 51 (1207), the court said:

> "The decisions of this court not only have repeatedly held that a Federal right, in order to be reviewable here, must be set up and denied in the state court, but have often held that such claim of denial is not properly brought to the attention of this court where it appears that the state court declined to pass upon the question because it was not raised in the trial court, as required by the state practice." (Citing cases.)

II.

NO SUBSTANTIAL FEDERAL QUESTION HAS EVER BEEN RAISED IN THIS CAUSE.

(A) The Eighth Amendment to the Constitution of the United States applies only to the National Government and does not apply to the State Government.

Petitioner's suggestion that she is being deprived of constitutional rights guaranteed to her by the Eighth Amendment to the Constitution of the United States does no present a substantial Federal question because that amendment has no application to the State Government. In *Ex parte*: *Spies*, 123 U. S. 131, 31 L. ed. 80, at page 86, the court said:

> "That the first ten articles of amendment were not intended to limit the powers of the state governments in respect to their own people, but to operate on the

National Government alone, was decided more than a half century ago, and that decision has been steadily adhered to since."

In *Collins* v. *Johnston,* 237 U. S. 502, at 510 and 511, 59 L. ed. 1071, at 1079, the court said:

"The 8th Amendment is also invoked, with its prohibition of cruel and unusual punishments; but, as has been often pointed out, this is a limitation upon the Federal government, not upon the states." (Citing cases.)

(B) Imprisonment for civil contempt until the contemnor complies with the order of court does not violate the provisions of the Fourteenth Amendment to the Constitution of the United States.

Aside from the omission of Daisy C. Tegtmeyer (petitioner herein) to state in what manner she has been deprived of her liberty or property without due process of law or her rights guaranteed by Article 14 of Amendments to the Constitution of the United States have been violated in any other manner, it will be observed that she was committed to jail for contempt of court. Her imprisonment under those circumstances does not present a substantial Federal question. In *Tinsley* v. *Anderson,* 171 U. S. 101 (43 L. ed. 91), Tinsley was ordered to turn over to the receiver of a corporation certain books and records which he had in his possession as an officer of the corporation. He failed to comply with the order and was committed to jail for contempt and sought his release from imprisonment on the ground that his constitutional rights had been violated.

The court said, at page 107 (97):

"The other objections suggested require no special consideration. It is said that the imprisonment for

contempt was limited by the state statute to three days (art. 1101, Tex. Rev. Stat.), but the state court held that that statute had reference to a quasi-criminal contempt as a punishment, and not to a civil contempt, where the authority of the court is exercised by way of compelling obedience. Rapalje, Contempt, sec. 21. This is not a Federal question, and we accept the ruling of the state court in its construction of the statute. It is urged that the order of commitment imposed an uncertain and indefinite term of imprisonment; but the order was that Tinsley should be confined until he complied, and the addition, 'or * * * until he shall be discharged by the further order of the court,' was merely intended to retain the power to discharge him if the court should thereafter conclude to do so, it being within his own power to obtain his discharge at any time by obeying the order. Nor is there any force in the objection that no trial by jury was awarded, for such trial was not demanded, and a jury trial is not necessary to due process of law on an inquiry for contempt. *Walker* v. *Sauvinet,* 92 U. S. 90 (23:678); *Eilenbecker* v. *Plymouth County District Court,* 134 U. S. 31 (33:801); Rapalje, Contempt, sec. 112."

On page 13 of the petition, in the argument in support of the petition, it is said that the petitioner is brought into the picture as a guarantor for her husband. The record discloses Daisy C. Tegtmeyer had possession and control of the trust funds which for years she has wilfully concealed. The record filed by petitioner herein does not contain the pleadings nor the decree but in her petition reference is made to the decision of the Supreme Court of Illinois in *Tegtmeyer* v. *Tegtmeyer,* 348 Ill. 434. It there appears that petitioner's husband, Edward Tegtmeyer, received $5,000 in accordance with the provisions of an

agreement (see pages 4 and 5 of the petition) and with reference thereto the court says on page 437:

"After the execution of this agreement the estate of Henry was closed and the assets distributed except the $5000 covered by the contract. In August, 1913, before the trust agreement was executed, Edward, without the knowledge or consent of the other heirs, took $5000 from the estate of Henry and invested it, together with $13,000 of his own funds and those of his wife, in vacant real estate in Chicago. Title to the land was taken in the names of Edward and Daisy. Edward died on November 1, 1924, leaving Daisy as his widow and sole heir-at-law.

The original bill was filed on March 11, 1925. It set up the facts substantially as above stated. After the bill was filed, Daisy Tegtmeyer on March 18, 1925, made a contract to sell the real estate in which the trust fund was invested. The Chicago Title and Trust Company refused to issue to the purchasers a title guaranty policy unless $10,000 was deposited with it to protect it against the outcome of this litigation. Daisy deposited the $10,000, and on April 20, 1925, a deed was executed to the purchasers and $46,240.01 was paid as the purchase price. The proceeds of this sale, including the $10,000 deposited with the Chicago Title and Trust Company, were invested by Daisy in stock of the Commonwealth Edison Company, the Middle West Utilities Company and the American Telephone and Telegraph Company. On May 1, 1925, an amended bill was filed. It described the real estate purchased by Edward and Daisy and alleged that it had been purchased in whole or in part with the proceeds of the trust fund in breach of the trust agreement, and that defendants in error were entitled to a conveyance of these premises or an undivided interest

therein. It set up the contract of March 18, 1925, to sell this real estate. On June 18, 1926, an amended and supplemental bill was filed, which alleged that Daisy had appropriated the trust fund, and the proceeds thereof, and had invested them in various properties. The master on May 18, 1929, filed his report, in which he recommended that, pending an accounting, Daisy and the Chicago Title and Trust Company be restrained from disposing of the $10,000 or the securities substituted therefor, and that Daisy be restrained, pending the accounting, from disposing of the stock of the American Telephone and Telegraph Company held by her. On January 10, 1930, the bill was again amended by alleging that Edward and Daisy had admitted that the $5000 trust fund was invested in the real estate and that it was held by them subject to the trust. The decree was entered March 18, 1930, and it directed Daisy to file an account setting out in detail all property in which the $5000 trust fund, or any part thereof, had been invested or intermingled, including all profits from investments."

The petition and record when tested by the rules above referred to show that no Federal question has been saved for review because (1) the record does not show that any Federal question was raised in the proceeding which the Court is now asked to review; (2) if such a Federal question had been raised, it was not decided and not necessary to a decision because the decision was to the effect that all questions raised had been disposed of on a previous appeal; (3) the petitioner by her appeal to the Appellate Court, under the Illinois practice, waived any constitutional question; (4) no substantial Federal question has ever been raised because Article VIII of Amendments to the Constitution of the United States, referred to by the petition, applies only to the Federal Government and does

not apply to the State Government, and (5) imprisonment for contempt to compel obedience to the order of a chancery court does not constitute depriving the contemnor of her liberty without due process of law.

On two previous occasions Daisy C. Tegtmeyer (petitioner herein) sought to have this Court review proceedings heretofore had in the Illinois Courts. An application for leave to file petition for Writ of Habeas Corpus was denied on May 18, 1936. *Original Ex parte Daisy C. Tegtmeyer, Petitioner,* 298 U.S. 642 (80 L. Ed. 1374). A motion for leave to file petition for Writ of Habeas Corpus was also denied by this Court on October 17, 1938. *Original Ex parte Daisy C. Tegtmeyer, Petitioner,* 305 U.S. 565 (83 L. Ed. 356).

Respectfully submitted,

L. Duncan Lloyd,
135 S. LaSalle Street,
Chicago, Illinois.
Attorney for Respondents.